

APPENDIX

Supreme Court, U. S.

FILED

MAY 8 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1014

UNITED STATES OF AMERICA,

Petitioner

—v.—

WILLIAM A. KUBRICK

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ~~NINTH~~ CIRCUIT

Third

PETITION FOR CERTIORARI FILED DECEMBER 21, 1978
CERTIORARI GRANTED FEBRUARY 21, 1979

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No. 78-1014

UNITED STATES OF AMERICA,

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—v.—

WILLIAM A. KUBRICK

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ~~SEVENTH~~ CIRCUIT

Third

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1972	
Sept. 14	Complaint filed
Sept. 14	Summons Exit
Sept. 26	Summons returned 9/15/72 served U.S. Attorney, Phila. on 9/18/72 served Attorney General of the U.S., Washington, D.C., by certified mail, filed
Sept. 26	Govt's interrogatories to pltff, filed
Sept. 13	Govt's Motion to Dismiss Complaint or in the alternative for Summary Judgment and Notice thereof, filed
Sept. 13	Govt's Affidavit in support of Motion to Dismiss or in the Alternative for Summary Judgment, filed
Sept. 13	Memorandum in Support of Motion of the United States to Dismiss Complaint or in the Alternative for Summary Judgment, filed
Dec. 4	Plff's Memorandum Contra to deft's Motion to Dismiss Complaint or in the Alternative for Summary Judgment, filed
1973	
Mar. 1	Plff's Answers to deft's interrogatories, filed
Mar. 5	Addendum to plff's Memorandum contra Motion of the United States to Dismiss Complaint or in the alternative for Summary Judgment, filed
July 26	Deposition of William A. Kubrick, filed
Oct. 3	Govt's supplemental interrogatories, filed
Nov. 6	Plff's answers to deft's supplemental interrogatories, filed

DATE	PROCEEDINGS
1973	
Nov. 6	Plff's interrogatories to deft, filed
Dec. 27	Deft's Supplemental Memorandum in support of its Motion to Dismiss, filed
1974	
Jan. 30	Plff's reply brief to deft's supplemental Brief in support of the Motion to Dismiss, filed
Mar. 21	Order DENYING deft's Motion to Dismiss and for summary judgment, filed 3/22/74 entered and copies mailed EB
Apr. 5	Pre-Trial Order Becker, J., filed 4/8/74 entered and copies mailed EB/C1
Apr. 23	Plff's Motion to compel answers to interrogatories, Memorandum in support thereof, filed
Apr. 26	Order that deft make full and complete answers to plff's Interrogatories Numbers 1 through 49 inclusive by 5/29/74, filed 4/29/74 entered and copies mailed EB
May 28	ANSWER, filed
May 28	CASE LISTED FOR TRIAL
May 28	Deft's answer to Plff's interrogatories, filed
Nov. 20	Plff's pretrial memorandum, filed.
Dec. 3	Def's. pretrial memorandum, filed.
1975	
Jan. 10	Deposition of Dr. James Cole, filed.
Feb. 26	Plff's first request for the production of documents and tangible things under Rule 34, filed.
Mar. 4	Def's. response to plff's. motion for sanctions, filed.
Mar. 18	Plff's. notices to depositions of Drs. Irons and Sternlieb, filed.

DATE	PROCEEDINGS
1975	
Mar. 18	Plff's. supplemental pretrial memorandum, filed.
Mar. 27	Def's. supplemental answers to plff's. interrogatories, second set, filed.
Mar. 27	Def's. supplemental pretrial memorandum, filed.
May 27	Def's. trial brief, filed.
May 29	Plff's. trial brief, filed.
July 8	Appearance of Leonard M. Sagot as co-counsel for plff., filed.
Aug. 22	Transcript of chambers conference, 8/13/75, filed. (Naythons, J.
Oct. 6	Motion of Leonard M. Sagot to withdraw as plff's. counsel, filed.
1976	
Apr. 28	Withdrawal of appearance of Paul R. Anapol, Esq. for the plff and entry of appearance of Klovsky, Kuby & Harris for the plff., filed
Apr. 28	Plff's supplemental memorandum contra deft's memorandum in support of its motion for summary judgment, filed
Apr. 29	Settlement conference memorandum, Naythons, Mag., J., filed
Apr. 29	TRIAL, non-jury, witnesses called & sworn, filed
Apr. 30	Trial of 4/29/76 resumes, filed
Apr. 30	Trial of 4/30/76 resumes, filed
May 4	Trial of 5/3/76 resumes, filed
May 5	Trial of 4/4/76 resumes, filed
May 6	Trial of 4/5/76 resumes, filed
May 10	Trial of 5/6/76 resumes, filed

DATE	PROCEEDINGS
1976	
May 27	Oral deposition of Dr. Max Boyd McQueen, filed
May 27	Stipulation to testimony of economic loss based upon total unemployability, filed
May 27	Trial of 5/27/76 resumes, filed
Jul. 22	Trial of 7/21/76 resumes, filed
Aug. 11	Deft's findings of fact and conclusions of law, filed
Aug. 30	Oral deposition of Joseph J. Peters, M.D., filed
Oct. 6	Deposition of Dr. Eleanor Ross, filed.
Dec. 27	Transcript of testimony held on 5/4/76, filed
1977	
Jul. 22	OPINION & ORDER, Becker, J. that judgment is entered in FAVOR of the plff. and AGAINST the Government in the sum of \$320,536.00, filed EB 7/25/77 entered & copies mailed
Jul. 25	ORDER that judgment is entered in FAVOR of plff. and AGAINST the deft. in the sum of \$320,536.00, filed EB 7/26/77 entered & copies mailed
Sep. 20	Deft's notice of appeal received on 9/20/77 at 8:30 A.M., filed 9/21/77 copies to; U.S. Att'y, Sagot, & K, K & H
Sep. 20	Copy of Clerk's notice of U.S.C.A., filed
Sep. 26	Transcript of testimony, 7-Vols., filed
Sep. 26	Transcript of testimony of Dr. Robert Wolfson, filed
Oct. 10	ORIGINAL RECORD TRANSMITTED TO U.S.C.A. (except papers 73, 76 & 87) (77-2388)—USCA #

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1815

WILLIAM A. KUBRICK

vs.

UNITED STATES OF AMERICA

COMPLAINT

The plaintiff herein is WILLIAM A. KUBRICK, who claims of the defendant herein the sum of Seven Hundred and Fifty Thousand (\$750,000.00) Dollars upon a cause of action whereof the following is a statement:

1. The plaintiff herein, WILLIAM A. KUBRICK, is a citizen and resident of the Commonwealth of Pennsylvania residing at Mickley Run Apts., Mickley and Overlook Road, Building 800, Apt. 1, Whitehall, Pennsylvania.
2. The defendant herein is the UNITED STATES OF AMERICA.

3. Jurisdiction is based upon the Federal Tort Claims Act, 28 U.S.C. § 2674 et seq.

4. On April 2, 1968, the plaintiff, William A. Kubrick, a veteran of service in the U.S. Armed Forces, presented himself to and was accepted by the Veterans' Administration Hospital, Wilkes-Barre, Pennsylvania, as a patient and was then and there hospitalized and while a hospital patient at the aforesaid Veterans' Administration Hospital between April 2, 1968 and April 30, 1968, he received medical and surgical care and treatment which medical and surgical care and treatment was negligently and carelessly administered to him. As a result of the negligent, careless malpractice of medicine permitted upon the plaintiff, he sustained severe and permanent bilateral nerve deafness which has caused him to expend various and diverse sums of money in and about an effort to obtain medical care and treatment and has

caused him to suffer severe loss of earnings and earning capacity and has caused him to suffer severe mental anguish, deprivation and loss of life's pleasures, interfered with the normal pursuit of his life both occupationally and as a husband and father and has caused him severe emotional and psychic injury, all to his great detriment and loss.

5. The plaintiff, William A. Kubrick, in no way contributed to nor assumed the risk of the injury he suffered as a result of the medical malpractice, carelessness and negligence of the physicians, professional nursing staff, agents, servants and employees of the Veterans' Administration in whose care he found himself at the Wilkes-Barre, Pennsylvania Veteran's Administration Hospital.

6. Upon the plaintiff, William A. Kubrick's learning for the first time that the injuries he suffered during his hospitalization of April 2, 1968 to April 30, 1968 at the Veterans' Administration Hospital in Wilkes-Barre, Pennsylvania were the result of the medical malpractice, carelessness and negligence of the physicians, professional nursing staff, agents, servants and employees of the Veterans' Administration, he filed a claim with the Veterans' Administration. On August 9, 1972, the Veterans' Administration denied that claim; hence, plaintiff's complaint is timely under the provisions of the Federal Tort Claims Act, 28 U.S.C. § 2675 et seq.

ETTINGER, POSERINA, SILVERMAN,
DUBIN, ANAPOL AND SAGOT

By /s/ Paul R. Anapol
PAUL R. ANAPOL
Counsel for Plaintiff

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

CLAIM NO. 17381329

KUBRICK, WILLIAM A.

The following statement is made in connection with a claim for benefits in the case of the above named veteran:

PLEASE CONSIDER THIS AS A SUPPLEMENTAL CLAIM FOR A BILATERAL DEFECTIVE HEARING CONDITION AS THE RESULT OF MEDICATION PROSCRIBED DURING MY PERIOD OF HOSPITALIZATION AT THE V.A.H. WILKES-BARRE, PA. IN APRIL 1968. SINCE MY PERIOD OF HOSPITALIZATION AT VAH-W-B, PA I HAVE BEEN RECEIVING TREATMENT FROM VARIOUS PHYSICIANS AND SINCE OCTOBER 1968 I HAVE BEEN RECEIVING TREATMENT BY DR. JOSEPH SATALOFF—1721 PINE ST. PHILADELPHIA, PA AND HE IS OF THE OPINION THAT AS THE RESULT OF MEDICATION PROSCRIBED A RESULTANT HEARING CONDITION OCCURRED.

IT WOULD BE APPRECIATED IF YOUR OFFICE WOULD WRITE DIRECT TO DR. JOSEPH SATALOFF IN FURTHER DEVELOPMENT OF MY EXAMS AND I AM SURE THAT DR. WILL COOPERATE.

4-16-69 /s/ William A. Kubrick
728 Lincoln St. Dickson City, Pa 18519

VA FORM 21-4138
JAN 1967

EXHIBIT A 2

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

Claim No. C 17 381 329

Kubrick William A.

The following statement is made in connection with a claim for benefits in the case of the above named veteran:

I recieved [sic] the decision of August 4, 1969, denying service connection for my claim for the loss of my hearing and the ear consition [sic] I now have. I am disatisfied [sic] with this decision and feel it is unjustified.

On April 2, 1968, I was admitted to the Wilkes-Barre Veterans Hosp. I was in severe pain, with my back and legs. It was necessary for me to undergo surgery the following day. I remained at the hosp a full month completely a bed patient, being allowed up in a wheel chair only the last 5 days of my stay there. I was discharged early in May 1968 to recuperate at home until July 1968, when I returned to my employment.

During my entire life, and when I entered the V.A. hoppital [sic] on April 2 1968, I HAD PERFECT HEARING AND NEVER ANY EAR PROBLEMS, WHICH IS A POSITIVE FACT.

It was after my hospitalization of April 1968, the first signs of my hearing problem appeared. I-did seek proffessional [sic] help from a Philadelphia Ear Specialist, Dr. Joseph Sataloff, under whos care I have been since and still presently under, He did request and review all past medical history. I was informed the medication given during my hospitalization of April-May 1968, was definate [sic] responsible [sic] for my loss of hearing. (He also further informed me this condition can neither can never be corrected by either surgery or any type hearing aid.) [sic] Through all this I have suffered a great deal both phsysically [sic] and mentaly [sic] not to mention the strain it has placed on my wife and children, also there is the financial strain paying for all the Medi-

cal expenses, travel expense, loss of time from work and now finally the possibility of losing my employment.

Sept. 25, 1969

/s/ William A. Kubrick

728 Lincoln St. Dickson City, Penna. 18519

Exhibit A-5

VA FORM 21-4138
JAN 1967

October 15, 1970
 728 Lincoln St.
 Dickson City, Pa. 18519
 C 17 381 329

Mr. Donald E. Johnson
 Administrator of V. A. Affairs
 Washington, D.C. 20420

Dear Mr. Johnson:

I wish to thank you for your prompt reply to my letter of Sept. 18 to Mr. Spiro Agnew.

In your letter you made mention you saw no basis for my reluctant attitude toward refusing certain recommended procedures suggested by the Administrations medical authorities. Needless to say, there is always a certain amount of risk involved when dealing with the Spine and the unfortunate results that can be the result of human error. As in the case of a local resident, who had been administed a Spinal as a anesthesia, Mrs. Clair Rossi, Peckville Pa., who never walked again and spent 15 years in a hospital bed until she died. I can sight many more examples and perhaps you could add to the list.

Mr. Johnson if I sound like too much of a Pessimist as your text in your letter hinted to, Please keep in mind I already have gone through much, when I lost my Hearing as the result of a Medical Error, whether or not the Veterans Administration cares to recognize the truth even after being presented with evidence from the most competent sources. When offered this evidence the original reason for denial was dropped and a new Idea was introduced by the board members, that of the possibilities of having a hearing problem prior to the hospital stay of April 1968, Upon hearing this new theory I spontaneously offered sources where information could be obtained to disprove this new theory. I did sign papers authorizing them to do so. I have sent for my own copies of this information to Tobyhanna Army Depot where I had been employed prior to this misfortune, where a routine record of audio test given there, proves I had good hearing prior to this hospitalization. I sent for these papers last July

when I returned from Washington, and recieved them within a week, I was informed by the V.A. district office in Phila. oct 8, when I stopped in while on route to my monthly visit to Dr. Jos. Sataloff, they had just sent for this evidence that day. I can only comment Two and one half years is not much time, except for the one bearing the burden.

It was mentioned in your letter the \$96.00 I receive for my 40 per cent disability is intended as merely a supplantment to my impairment of earning capacity. It may be intended for this purpose however when a man has been unable to work for over nine months and must spend on the average of \$60.00 per month for medical expense for audio problems it then becomes more than perhaps a supplantment but a means of my living.

According to recent News Media I see I am not alone with my problems or opinions and I am aware of your opinion as given to top agency officials that conditions and criticism of V.A. Medical Facilities are exaggerated and unwarranted espically those presented by Life Magazine. All I care to say in the matter, I suffered the consequence of an error, told the truth, produced sufficient reputable evidence and then suffer further because someone does not feel they can admit to the truth of making a mistake.

If you contend my evidence to be wrong and the diagnosis given by Dr. Sataloff, Bethesda Naval Hosp. and specialist from Mass. Eye and Ear Hospital incorrect I would be the one most pleased as then I can look forward to a restoration of my hearing instead of facing the facts they all told me that I must live with this as there is no known correction for this, surgery or otherwise and further stated a hearing aid would be useless. Perhaps you recommend me to a hospital or doctors capable of correcting this error.

Sincerely,

/s/ William A. Kubrick
 WILLIAM A. KUBRICK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—
No. 77-2388
—

WILLIAM A. KUBRICK, APPELLEE

v.

UNITED STATES OF AMERICA, APPELLANT
—

Present: ADAMS, WEIS and GARTH, *Circuit Judges.*

ORDER

Upon consideration of appellant's Motion to Amend the opinion of the court filed on July 27, 1978, it is

ORDERED that the motion is denied.

BY THE COURT,

/s/ Joseph Weis, Jr.
Circuit Judge

DATED: September 13, 1978

Report on KUBRICK, William A.
or
REPORT OF BOARD ACTION
Continuation of S.F. 8/11/69

CLINICAL RECORD

1. A Board composed of Doctors H. Stuart Irons, Jr., Milton Kantor, and Edward R. Janjigian, met on this date to consider whether an alleged hearing loss, discovered on the above-named patient has any relationship to the use of Neomycin during a period of prior hospitalization.

2. The above-named patient was hospitalized here from 4/2/68 to 4/30/68, because of recurrent osteomyelitis of the right femur. On 4/3/68, incision and drainage of a small abscess cavity adjacent to the posterior lateral aspect of the right femur was carried out. Two Hemovac tubes were placed in the cavity and brought out through separate stab wounds. Two days later topical 1% Neomycin solution was used for a total period of 10 days. This was applied in the form of an irrigation with a Neomycin solution dripped through one Hemovac tube with suction being maintained on the second tube. At no time did the patient receive Neomycin systemically. Review of the C-Folder revealed the result of air conduction tests but no complete audiogram, and no previous data to indicate whether or not the patient had any hearing loss prior to April 1968.

3. The nephrotoxic and ototoxic adverse reactions mentioned in the package literature concerning Mycifradin, or Neomycin, apply only to its use systemically. The only adverse reaction mentioned in regard to topical use is the occasional production of a sensitivity reaction on abraded skin. Furthermore, the Board knows of no reports in the literature of eighth nerve damage from limited topical use of this drug. The topical use of Neomycin, particularly in solution, as in the present case, is common practice at this hospital, particularly on the Surgical Service, and adverse reactions are unknown.

For these reasons, and because in the present case the solution was run into the wound through one tube and out the other, with a very small quantity of solution in contact with tissue at any one time, the Board is of the opinion that there is no relationship between the use of Neomycin in this case and the alleged hearing loss.

4. In view of the above the Board, therefore, finds no evidence of carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault on the part of the Government.

/s/ Stuart Irons, Jr.
STUART IRONS, JR., M.D.
Chief, Surgical Service
(Chairman)

/s/ Milton Kantor, M.D.
MILTON KANTOR, M.D.
Chief, Medical Service
(Member)

/s/ Edward R. Janjigian
EDWARD R. JANJIGIAN, M.D.
Chief, Psychiatry & Neurology Service
(Member)

[SEAL]

VETERANS ADMINISTRATION
Center
Wissahickon Ave. and Manheim St.
P.O. Box 8079
Philadelphia, Pa. 19101

Sep. 5, 1969

Your File Reference:

In Reply Refer to:
C 17 381 329
310/211A

Mr. William A. Kubrick
728 Lincoln St.
Dickson City, PA 18519

Dear Mr. Kubrick:

We have carefully reviewed your claim for service connection, for defective hearing.

It has been determined that your alleged hearing loss is not medicinally or medically attributable to your recent hospitalization at the VA Hospital, Wilkes-Barre, PA. Accordingly, your claim is disallowed.

You will continue to receive \$43 monthly for your back condition.

Sincerely yours,

/s/ R. J. McCauley
R. J. McCAULEY
Adjudication Officer

Enclosure
21-4107

cc:
DAV

Include Zip Code in your return address and
give veteran's social security number.

September 26, 1969

C 17 381 329

VETERANS ADMINISTRATION CENTER
P. O. BOX 8079
PHILADELPHIA, PA 19101

STATEMENT OF THE CASE

IN THE APPEAL

OF

WILLIAM A. KUBRICK

FROM THE DECISION OF THE
VETERANS ADMINISTRATION

NOTICE TO APPELLANT:

This is not a decision on the appeal you have initiated. It is a "Statement of the Case" which the law requires us to furnish to help you in completing your appeal.

Please read the forwarding letter carefully, as well as the instructions on the enclosed appeal form. These explain your appeal rights and tell you what you must do to complete your appeal.

A copy of this "Statement of the Case" has been furnished your representative: DAV

ISSUE:

1. Entitlement to increased compensation for a service connected back condition, lumbrosacral strain.
2. Entitlement to service connection for defective hearing claimed as secondary to hospital treatment of non-service connected osteomyelitis, right femur.

Veteran contends that his defective hearing was the direct result of treatment he received at the Veterans Administration Hospital, Wilkes-Barre, Pa., in April 1968, and that his back condition has increased in severity.

SUMMARY OF EVIDENCE AND ADJUDICATION ACTION:

Service:	October 1950 to September 1951. Honorable
April 2, 1968 to April 30, 1968:	Report from Veterans Administration Hospital, Wilkes-Barre, Pa., reveals veteran hospitalized for increasing pain in right thigh. A small abscess adjacent to posterior aspect of right femur was incised and drained. He was placed on oral poly-cillin and neomycin irrigation through Hemovac tubes. He improved, the wound healed and tubes were removed. He became ambulatory without complaints and was discharged to the care of his own physician. The diagnosis was osteomyelitis of the right femur.
June 14, 1968:	The Rating Board denied service connection for osteomyelitis of the right femur since it was not found to be related to the veteran's lumbosacral strain. He was notified of this decision by letter dated June 24, 1968.
August 28, 1968:	Pursuant to veteran's claim for increased compensation for his back condition a physical examination was scheduled and disclosed mild muscle spasm in the paravertebral lumbar area. Forward bending was limited by about thirty percent (30%), finger-tips twelve inches (12") from floor. There was lack of lordotic curve, and discomfort in recovering from bent position. Backward flexion was only slightly limited with some discomfort at extreme. Motions in lateral components were not restricted or symptomatic. X-ray of low back on June 10, 1968, of the lumbar vertebrae, and bones of pelvis revealed no gross abnormalities.

September 26, 1968: Based on a review of the foregoing examination and the veteran's Outpatient Treatment Records, which showed he reported June 10, 1968, for a lumbosacral support, the Rating Board increased the evaluation for his back condition to twenty percent (20%), effective the date he reported for the brace. He was notified of this increase by letter dated October 2, 1968.

April 17, 1969: Veteran's supplemental claim received for service connection for defective hearing, which he alleges was the result of medication prescribed during his hospitalization at the Veterans Administration Hospital, Wilkes-Barre, Pa. in April 1968.

July 2, 1969: Medical statement dated June 30, 1969, received from Joseph Sataloff, MD, who diagnosed the veteran's condition as "cochleites", and commented that there was an excellent chance that the veteran's hearing loss was the result of neomycin toxicity. He enclosed a copy of an audiogram showing hearing loss, particularly in the upper ranges. This was on air conduction test only, which the doctor said indicated a progressive degeneration.

August 11, 1969: A Board of Physicians was convened to consider whether the veteran's hearing loss had any relationship to the use of neomycin during his period of hospitalization in April 1968. They found that on April 3, 1968, there was an incision and drainage of a small abscess cavity adjacent to the posterior lateral aspect of the right femur. Hemovac tubes were placed in the cavity, and two days later

topical 1% neomycin solution was used for 10 days. At no time did veteran receive neomycin systemically. They further found that the adverse reaction mentioned in the package literature concerning neomycin applied only to its use systemically, the only adverse affect of topical use, particularly in solution, as in this case and as in the common practice in the hospital, was a sensitivity reaction on an abraded skin. Adverse reactions in the topical use as indicated were unknown from experience. Because of the topical use, and the fact that only a very small quantity of solution was in contact with tissue at any time, the Board was of the opinion that there was no relationship between the use of neomycin and the claimed hearing loss. They found no evidence of carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault.

August 28, 1969: The Rating Board considered the issue of service connection for defective hearing, and after a comprehensive review of the entire record, determined that the veteran had no additional disability resulting from medical or surgical treatments. The twenty percent (20%) evaluation for his back condition was continued. He was notified of this decision by letter dated September 5, 1969.

September 9, 1969: Veteran's claim for increased compensation for his back condition received, requesting a review of his Outpatient Treatment Records for this purpose.

September 19, 1969: Inquiry from the Honorable Joseph M. McDade, Member of Congress, accepted as veteran's Notice of Disagreement.

September 24, 1969: Outpatient Treatment records were reviewed, and an examination on September 3, 1966, revealed veteran's forward bending of trunk was restricted to fifty percent (50%), backward bending and to either side was moderately restricted. He had difficulty doing a squat and assuming an erect position thereafter. Veteran indicated his symptoms were about the same. He wore a back brace from which he said he derived benefit, and which fit properly and was in good condition. On September 17, 1969, he denied improvement, but was able to sit, rise, stand and walk with ease. X-rays of the lumbar vertebrae on September 3, 1969, showed no gross abnormalities.

C 17 381 329

KUBRICK, William A.

On this same date the Rating Board reviewed the Outpatient Treatment records, found no increase in evaluation was warranted, and confirmed the Rating action of September 26, 1968 and August 28, 1969.

**PERTINENT LAW, REGULATIONS:
RATING SCHEDULE PROVISIONS:**

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. 4.1)

The veteran's lumbrosacral strain is evaluated as twenty percent (20%) disabling because there is moderate limitation of motion, mild muscle spasm, difficulty on forward bending and characteristic pain on motion. For a fourth [sic] percent (40%) evaluation, there must be listing of the whole spine to the opposite side, positive Goldthwait's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion. (38 C.F.R. Part 4, Code 5295)

Where a veteran suffers an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or examination, and such injury or aggravation results in additional disability, compensation may be awarded in the same manner as if such disability were service connected. (38 U.S.C. 351)

Compensation may not be payable for either the usual or the unusual results of approved medical care properly administered, where the evidence does not show that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment or other instances of indicated fault on the part of the Veterans Administration. (38 C.F.R. 3.358(c))

DECISIONS:

1. Entitlement to increased compensation for service connected back condition is not warranted.
2. Entitlement to service connection for defective hearing as being due to hospital treatment is not established.

REASONS FOR DECISION:

The actual symptomatology as presented on examination does not reveal the more severe conditions as are set forth above and required for an increase in compensation for the veteran's service connected back condition. In comparison with previous examinations there has been little change shown since the increase was granted effective June 10, 1968. The symptomatology does not meet the schedular requirements for a higher evaluation.

It has not been shown that the treatment afforded the veteran for his nonservice connected osteomyelitis had any causal relationship to his claimed defective hearing or diagnosed inflammation of the inner ear. The statement from his physician was speculative, suggestive of a possibility, not a positive finding. The topical use of neomycin in solution in the irrigation process is medically acceptable and proper following surgery, and the hospital has had no adverse reactions when it is so used. The known adverse reaction, and that on which the veteran bases his claim, is where it is administered systemically, which was not done in this case. No carelessness, accident, negligence, lack of proper skill, error in judgment or other instance of indicated fault on the part of the Veterans Administration has been shown, so that the decision denying service connection for additional disability due to hospital treatment is found correct and affirmed.

Submitted: /s/ [Illegible]

Date: September 29, 1969

Approved: /s/ [Illegible]

Date: 9-29-69

BOARD OF VETERANS APPEALS

Washington, D.C. 20420

IN THE APPEAL OF

WILLIAM A. KUBRICK

C-17 381 329

FINDINGS AND DECISION

Date: Sep 10 1970

DOCKET NO. 70-09 856

THE ISSUE

Entitlement to service connection for defective hearing and entitlement to an increased rating for back condition.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESSES AT HEARING ON APPEAL

William A. Kubrick, appellant, and Mrs. William A. Kubrick

EXHIBIT "D"

ACTIONS LEADING TO PRESENT APPELLATE STATUS

The appeal is from actions of the agency of original jurisdiction which denied service connection for defective hearing and which increased a ten per cent (10%) rating for service-connected lumbosacral strain to a twenty per cent (20%) rating effective June 10, 1968, and which increased the twenty per cent (20%) rating to forty per cent (40%) effective September 3, 1969, for lumbosacral strain with possible herniated intervertebral disc of the lumbosacral joint. A total hospital rating was assigned from January 13, 1970, through February 28, 1970, and the prehospital schedular rating of forty per cent (40%) was assigned effective March 1, 1970. The veteran has no other service-connected disability.

CONTENTIONS

It is contended that the medical evidence shows many clinical symptomatic findings of the back condition, progressive in nature, which require periodic outpatient treatment and hospitalization, the use of a lumbosacral back brace, medications, a bedboard and exercises; and that the symptoms are such as to produce discomfort and pain on all motions.

THE EVIDENCE

Mr. Kubrick was hospitalized by the Administration in April 1968 because of acute osteomyelitis of the right femur.

The outpatient treatment records show that the lumbosacral support was prescribed on June 10, 1968, and fitted later in the same month. The veteran complained of recurrent low backache in July 1968.

When the veteran was examined by the Administration in August 1968, he complained that his back ached constantly and that lifting was very limited. He reported that he wore a back support most of the time. He slept

poorly due to back pain. He was employed as a machinist and lost occasional days from work due to sickness. The examination revealed mild muscle spasm in the paravertebral lumbar area. Forward bending was limited by about 30 per cent. The finger tips came to within 12 inches of the floor. There was a lack of lordotic curve. He complained of discomfort in recovery from the bent position. Backward flexion was only slightly limited. Lateral motion was not restricted. It was stated that an X-ray examination in June 1968 had disclosed no gross abnormalities. The diagnosis was lumbosacral strain.

The veteran returned to the outpatient treatment service in July 1969 with complaint of backache. On September 3, 1969, he complained of pain in the lower back with radiation down the legs. An examination showed 50 per cent restriction of forward bending and moderate restriction of backward and lateral bending. He had difficulty in doing a squat and in recovering from it. Later in September 1969, it was stated that he sat, rose, stood and walked with ease. In October 1969, the veteran reported that heat treatment did not help him. He requested stronger medication.

In October 1969, he reported that his back brace was uncomfortable in a sitting position. An examination disclosed about 30 per cent limitation of motion of the lumbar spine. There was no sciatic tenderness. Straight leg raising was negative. Reflexes were equal and active bilaterally. A review of the X-rays revealed no narrowing of the intervertebral spaces. Williams' [sic] exercises were prescribed. In November 1969, it was stated that the veteran was apparently not following through with the prescribed exercise program.

Mr. Kubrick was hospitalized in January and February 1970 for observation for osteomyelitis of the right femur. On examination there was limitation of motion of the lumbosacral spin. Straight leg raising was to 50 degrees. There was no tenderness on palpation over the vertebral column or in the paravertebral area. An X-ray examination disclosed narrowing of the lumbosacral joint

space. The veteran refused further hospitalization for a myelogram. A diagnosis was made of possible herniated nucleus pulposus.

A bedboard was authorized by the outpatient treatment service later in February 1970. In March, April and May 1970, the veteran continued to complain of pain and that he was unable to return to work.

At a hearing on appeal before the Board in July 1970, the veteran testified that he could not perform his duties as a machinist due to his back condition. His job required standing for long periods of time, bending, lifting, etc. He was also restricted in doing things around the house. He wore a back brace every day. He usually did not wear it except when he went out or was a little active. He did normal housework and sometimes went shopping with his wife. He drove an automobile. Mrs. Kubrick stated that she had seen him go to work under the influence of medication, and hoped and prayed that he would not fall on the machines. He had to go to work because of his responsibilities.

THE LAW AND REGULATIONS

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. Part 4) Separate diagnostic codes identify the various disabilities.

A twenty per cent (20%) rating is provided for lumbrosacral strain where there is muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position. A forty per cent (40%) rating is provided for severe lumbrosacral strain where there is listing of the whole spine to the opposite side, positive Goldthwait's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of the joint space, or some of the above with abnormal mobility on forced motion. The forty per cent (40%) rating is

the maximum provided by the schedule for rating disabilities. (Code 5295-5294)

DISCUSSION AND EVALUATION

Herniated nucleus pulposus of the intervertebral disc of the lumbrosacral joint has not been clinically demonstrated as the veteran did not desire to undergo the necessary laboratory procedures to substantiate or rule out this disease.

FINDINGS OF FACT

1. The veteran was fitted with a back support in June 1968, but continued to complain of back pain.
2. An examination in August 1968 disclosed mild paravertebral muscle spasm, 30 per cent limitation of forward bending, a slight limitation of backward extension and no limitation of lateral motion.
3. An examination in September 1969 revealed a complaint of pain in the low back with radiation into the legs, 50 per cent restriction of forward flexion, moderate restriction of backward extension and lateral motion, and difficulty in doing a squat.
4. An examination in October 1969 revealed no sciatic tenderness.
5. During hospitalization in January and February 1970, there was no tenderness on palpation over the vertebral column or in the paravertebral area. X-ray evidence showed narrowing of the intervertebral space of the lumbrosacral joint.

CONCLUSIONS OF LAW

1. The schedular provisions for a rating in excess of twenty per cent (20%) for lumbrosacral strain effective January 10, 1968, are not met. (38 U.S.C. 355; 38 C.F.R. Part 4 (Code 5295-5294))

2. A forty per cent (40%) rating, the maximum rating provided by the schedule, has been assigned effective September 3, 1969, for lumbrosacral strain. (38 U.S.C. 355; 38 C.F.R. Part 4 (Code 5295-5294))

DECISION

Entitlement to an increased schedular rating for lumbrosacral strain is not established and, to this extent, the appeal is denied.

REMAND

From a review of the evidence now available on the issue of service connection for defective hearing, it is the decision of the Board that the case be REMANDED for the following action:

1. The agency or original jurisdiction should obtain reports from Stanley Mazaleski, M.D., 166 North Main Street, Old Forge, Pennsylvania 18518, and from Joseph J. Soma, M.D., 327 North Washington Avenue, Scranton, Pennsylvania 18503, as to examinations and treatment for the veteran's ears from June until August 1968.

2. There should also be obtained copies of the veteran's examinations for employment at Tobyhanna Military Depot, Tobyhanna, Pennsylvania, in October or November 1966, and from R.C.A., Keystone Industrial Park, Dunmore, Pennsylvania, in December 1966.

When the development has been completed, the claim should be reviewed by the originating agency and reprocessed in accordance with current appellate [sic] pro-

cedures. No action is required of the veteran unless he receives further notice.

/s/ John G. Riggins
JOHN G. RIGGINS, M.D.
Associate Member

/s/ I. Kleinfeld
I. KLEINFELD
Associate Member

/s/ J. L. Ray
J. L. RAY
Acting Associate Member

VA Form 21-6796b

Rating Decision

File No. C 17 381 329

May 6, 1971

W. A. KUBRICK

(Item 20. Narrative)

- J. BVA remand—claim for increase 9-18-70.
- I. SC for bilateral hearing loss.
Entitlement to total disability due to individual unemployability.
- F. BVA remanded case 9-10-70 for additional development relating to question of SC for hearing loss as result of medical treatment.

BVA affirmed evaluation of 40% for the lumbrosacral strain.

Report 11-21-70 from S. Mazaleski, M.D., Old Force, Pennsylvania disclosed treatment from 6-68 to 8-68 for bilateral deafness, cause undetermined. He was interviewed by V.A. Field Examiner on 1-26-71. The doctor related he treated veteran for colds in past without indicating or revealing any treatment for hearing, that he referred veteran to Dr. Soma for ears since he did not treat ears. He had no records and therefore unable to provide any dates of treatment. Statement from J. J. Soma, M.D., Scranton, PA dated 11-21-70 disclosed he examined veteran 8-27-68 for complaints of noise both ears, for some period of time. Veteran had worked as Machinist. There were no other significant ENT or systemic complaints. Audiometric testing disclosed bilateral sensory neural hearing loss involving high tones. DB loss right ear 30 (2000 cycles) 65 (4000 cycles) left ear 40 (2000 cycles) 70 (4000 cycles). VA Field Examiner interviewed Dr. Soma on 1-26-71. The doctor furnished original records which were

photostated and were essentially as cited above. The doctor felt that the hearing problem was result of veteran's employment in the Machine Shop. Letter to Dr. Mazaleski 8-30-68 noted complete history of his patient obtained, that he felt the hearing loss due to acoustic trauma and institute therapy with naso-dilators. Veteran did not return for follow-up.

Civil Service Medical examination 9-20-66 disclosed normal hearing on audiometric exam thru 4000 cycles, both ears.

Pre-Placement Status Exam done at RCA, Dunmore, PA 12-2-66 revealed hearing acuity of 20/20 bilaterally.

In addition veteran submitted statements from his Pastor, Fraternal Brothers and friends all stating that veteran did not have a hearing disability prior to April 1968 and that after April 1968 he had a hearing defect.

Cited VA exam revealed relatively normal ears, that veteran gave history of hearing loss first noticed in June or July 1968, that he had continuous ringing in ears. Audiometric testing revealed db loss of 90 at 2000 cycles with average of 42 db loss right ear; SRT of 90 with 0% discrimination ability left ear (E-F).

With respect to his back disability, veteran submitted no additional medical evidence. OPT revealed he was treated frequently since at OPC for complaints relating to his back. Exam 6-17-70 revealed no neurological findings. X-rays of LS spine were not remarkable. He complained of constant pain, used bed board.

In his F527 dated 9-16-70 veteran stated he has been unable to work since 1-13-70 because of his chronic lumbrosacral strain.

- D. A review of the record including all the evidence obtained as result of the BVA remanded decision and the additional evidence including current VA exam does not show that the veteran's hearing disability was due to any carelessness, lack of medical skill, negligence or error in judgment, malpractice or other known neglect on part of the Staff of the VA Hospital.

In fact, veteran's own private ENT Specialist indicated that the hearing loss was felt to be due to veteran's previous employment as a Machinist and was due to accoustic trauma.

With respect to entitlement to Code 18, Pr. 16 benefits, veteran's SC lumbrosacral disability does not meet the schedular requirements for his benefits. The medical record does not show entitlement in excess of 40% for the back disability.

Entitlement to total disability as result of individual unemployability is not established.

Prior decisions are confirmed and continued.

VA Center
Philadelphia, PA 19101

C 17 381 329
KUBRICK, William A.
Representative: VFW

SUPPLEMENTAL STATEMENT OF THE CASE

This Supplemental Statement of the Case is furnished to inform you of all evidence received after the Statement of the Case was mailed to you on September 29, 1969.

ISSUE:

1. Entitlement to service connection for defective hearing.
2. Entitlement to an increased evaluation for a service connected back condition.

SUMMARY OF EVIDENCE AND ADJUDICATION ACTIONS:

See Statement of the Case dated September 26, 1969.

September 28, 1969 A letter from the Honorable Joseph M. McDade, Member of Congress, in behalf of the veteran was received.

September 30, 1969 A statement from Dr. J. Sataloff was received stating that there was a very excellent possibility that the veteran's hearing damage could have been due to the use of neomycin by irrigation.

December 29, 1969 A letter from the Honorable Hugh Scott, United States Senate, in behalf of the veteran was received.

January 5, 1970 The veteran filed a substantative appeal.

January 15, 1970 A copy of the veteran's letter to the Honorable Richard S. Schweiker, United States Senate, was received.

February 13, 1970 VA Hospital report was received showing the veteran was admitted to the hospital on January 13, 1970, for his back and leg condition.

February 25, 1970

VA Hospital report was received showing the veteran was hospitalized from January 13, 1970 to February 16, 1970. X-rays of the lumbar spine were unremarkable. There was a possibility of a herniated disk. Examination revealed limitation of motion in the lumbosacral spine and some pain on straight leg raising at approximately 50 degrees of elevation. No evidence of active difficulty was found with the right femur. An audiogram showed his hearing was decreased in acuity in each ear. The veteran refused a myelogram. He was discharged with maximum hospital benefits on February 16, 1970.

March 2, 1970

The outpatient treatment records were received showing the veteran was seen on September 3, September 17, October 14, October 15, November 24, and December 15, 1969. Examination of back revealed motion is limited to 30%. There were abnormal curvatures of the spine. No sciatic notch tenderness. Straight leg raising was negative. Reflexes equal and active bilaterally. X-rays revealed no narrowing of the intervertebral spaces. No abnormal position of the bones. Physical therapy by therapist was not doing any good.

March 5, 1970

The Rating Board increased the veteran's evaluation for his back condition to a temporary one hundred percent (100%) from January 13, 1970 to February 28, 1970 because of hospitalization and reduced it to his prehospitalization evaluation of forty percent (40%) from March 1, 1970. The veteran was notified by letter dated May 21, 1970.

July 13, 1970

A copy of a letter dated January 22, 1970, from Dr. H. F. Schuknecht to the veteran was received stating neomycin was a very ototoxic drug which could be absorbed into the system when used as an irrigating solution.

At a hearing held before the Board of Veterans Appeals in Washington, D.C., the veteran restated that his defective hearing was the result of the drug "neomycin" and his back condition increased in severity.

September 10, 1970

The Board of Veterans Appeals remanded the case for further development regarding service connection for defective hearing and determined an increased evaluation for a lumbosacral strain was not warranted. A copy of the decision was forwarded to the veteran.

September 18, 1970

The veteran filed VAF 21-527, Statement of Income, Net Worth and Employment, showing veteran last worked on January 2, 1970.

October 8, 1970

Civil Service examination dated September 20, 1966, showed ears to be normal.

October 12, 1970

VA Outpatient treatment records were received showing the veteran was seen on February 24, March 9, April 1, May 1, and May 27, 1970. Veteran continued to have pain and there was no change in the back condition.

October 22, 1970

RCA examination dated December 2, 1966 was received showing hearing 20/20 both ears.

October 27, 1970 VA Outpatient treatment records were received showing the veteran was seen on June 17, June 29, July 30 and August 28, 1970. Veteran continued to have back pain and was unable to work.

October 29, 1970 A statement from J. Fred Parkyn, minister was received stating he knew the veteran since June 1966 and he had no difficulty with his hearing prior to his hospitalization in April 1968.

A statement from William F. Demming was received stating he and two friends visited the veteran on or about the last Sunday in April 1968 and said the veteran could hear everything said. He stated in the middle of 1969 his hearing was so bad the veteran could not tell what was going on at lodge meetings.

November 26, 1970 A statement signed by friends was received stating he had no difficulty with his hearing prior to his illness on or about April 1968.

November 28, 1970 Dr. J. J. Soma's statement was received showing he examined the veteran on August 27, 1968. Audiometric examination revealed bilateral sensory neural hearing loss, involving high tones. He was placed on antivert for a trial period and was to return in one week. There was no follow-up visit and no further evaluation or therapy.

February 19, 1971 VA Field Examination Report: Dr. J. J. Soma stated after examining the veteran on August 27, 1968, he concluded that the veteran's problem was a result of his employment in the machine shop. He stated he planned on treating the veteran along such lines, but he never came back for further treatment.

Dr. S. Mazaleski stated he treated the veteran for colds in the past. He said he did not treat ears and referred the veteran to Dr. Soma. When asked if he would provide dates of treatment, diagnosis or medication, Dr. Mazaleski stated he did not want to get involved and had no record on the veteran.

March 29, 1971 VA audiometric examination: right ear in the 500, 1000 and 2000 cycles showed 10, 25 and 90, left ear—speech reception threshold 90 decibels—discrimination ability zero percent (0%). Right ear showed percipitous sensori-neural depression with moderately depressed discrimination. Left ear showed severe sensori-neural depression, with no usable hearing for speech discrimination.

May 6, 1971 The Rating Board reviewed all evidence and confirmed and continued prior ratings. The veteran did not meet the schedular requirements for individual unemployability. Entitlement to a total rating due to individual unemployability was not established.

*PERTINENT LAWS: REGULATIONS: RATING
SCHEDULE PROVISIONS:*

See Statement of the Case dated September 26, 1969.

DECISION:

1. Entitlement to service connection for defective hearing is not established.
2. Entitlement to an increased evaluation for a service connected back condition is not warranted.

REASONS FOR DECISION:

See Statement of the Case

See Board of Veterans Appeals decision regarding an increase in evaluation for a service connected back condition which was denied.

The additional evidence including the current VA examination does not show the veteran's hearing disability was due to any carelessness, lack of medical skill, negligence or error in judgment, malpractice or other knowledge on the part of the staff of the VA Hospital.

The veteran's own ear, nose and throat specialist indicated that the hearing loss was felt to be due to the veteran's previous employment as a machinist and was due to acoustic trauma.

Submitted by: /s/ B. J. Cohen—5-20-71

Approved by: /s/ [Illegible]—5-20-71

JUNE 22 1971

C 17 381 329
310/211A

Mr. William A. Kubrick
728 Lincoln St.
Dickson City, VA 18519

Your disability compensation claim has been carefully reviewed based on all the evidence, including the medical statement of Dr. Joseph J. Soma.

The evidence does not warrant any change in the previous determination. There is no relationship between the use of neomycin and your defective hearing. Payments of \$96 monthly will continue.

Please inform us by return mail if you are submitting any additional evidence prior to returning your case to the Board of Veterans Appeals.

M. H. TALLEN
Adjudication Officer

Enclosures

cc: VFW

BOARD OF VETERANS APPEALS
Washington, D.C. 20420

Docket No. 70-09 856

Date—August 9, 1972

FINDINGS AND DECISION

IN THE APPEAL OF

WILLIAM A. KUBRICK
C 17 381 329

THE ISSUE

Service connection for defective hearing under 38 U.S.C. 351.

REPRESENTATION

Appellant represented by: Paul R. Anapol, Attorney.

WITNESSES AT HEARING ON APPEAL

William A. Kubrick, appellant, and Mrs. William A. Kubrick.

ACTIONS LEADING TO PRESENT
APPELLATE STATUS

The case was before the Board in September 1970 at which time it was remanded for additional development. This has been substantially accomplished and the case is now presented for further appellate review.

CONTENTIONS

It is contended, in substance, that the veteran developed defective hearing because, while he was a patient in an Administration hospital from April 2, 1968, to April 30, 1968, and due to negligence on the part of the

Veterans Administration and its personnel, Neomycin was inappropriately used.

THE EVIDENCE

A Civil Service examination report, dated in September 1966, showed essentially normal hearing, both ears.

An examination for Radio Corporation of America in December 1966 showed hearing 20/20, both ears.

The record includes the clinical records of the veteran's hospitalization by this Administration from April 2 to April 30, 1968. These records show that the 38-year-old veteran was admitted to the Veterans Administration Hospital at Wilkes-Barre, Pennsylvania, with progressively increasing pain of the posterolateral aspect of the right thigh of some two weeks' duration, associated with fever. He was being seen by a private physician who had been giving him pain pills. During hospitalization examination of the extremities disclosed fulness to palpation of the lower third of the posterolateral aspect of the right thigh. Examination of the ears was negative. Initial diagnosis was that of the osteomyelitis, right femur. On April 3, he had incision and drainage of a small abscess adjacent to the posterior aspect of the femur. Two hemovac tubes were introduced into the depths of the wound, one proximally and the other distally, through two stab wounds. He was placed on polycillin and Neomycin irrigation through the hemovac tubes. A one per cent topical solution of Neomycin was dripped through one tube and suctioned out of the other tube. On April 6, the Neomycin drip was not working. Dressings were reapplied. One hundred fifty cubic centimeters of bloody, thick, liquid were removed from the bellows. The skin was red in several areas of the thigh. On April 7, the Neomycin drip was running well. The leg was redressed. The bellows were emptied and 100 cubic centimeters of dark, brownish, red liquid were measured and discarded. On April 8, 1,000 cubic centimeters of one per cent Neomycin solution were added to irrigation. On April 10, 900 cubic centimeters of one per cent Neomycin solu-

tion were added to irrigation. The bellows were emptied of 90 cubic centimeters of rusty colored drainage. On April 11, an upper plastic tubing was removed and replaced with a Robinson catheter. On April 12, irrigation was not working properly. On April 13, irrigation was apparently working well. On April 14, 400 cubic centimeters of drainage were emptied from wall suction. On April 16, 900 cubic centimeters of one per cent Neomycin solution were added to the irrigation. On April 17, the tubes were removed. During hospitalization he became improved and became afebrile. Mr. Kubrick became ambulatory without complaints and was discharged with maximum hospital benefits on April 30, 1968, to return to the care of his own physician. The diagnosis was osteomyelitis, acute, right femur.

Joseph Sataloff, M.D., stated in June and September 1969 that he had treated the veteran since November 1968 for bilateral, ringing tinnitus; that the diagnosis was "cochleitis"; and that there was an excellent chance that the veteran's hearing loss was the result of Neomycin toxicity. He enclosed a copy of an audiogram showing hearing loss, particularly in the upper ranges, on air conduction tests. Dr. Sataloff stated that there was a progressive degeneration of the veteran's hearing in a period of several months.

A report, dated in August 1969, from a Veterans Administration Board of Physicians showed that they met to consider whether the veteran's hearing loss had any relationship to the use of Neomycin during his period of hospitalization in April 1968. They found that on April 3, 1968, there was an incision and drainage of a small abscess cavity adjacent to the posterolateral aspect of the right femur. Hemovac tubes were placed in the cavity, and two days later topical one per cent Neomycin solution was used for 10 days. This was applied in the form of an irrigation with Neomycin solution which dripped through one hemovac tube with suction being maintained on the second tube. At no time did the veteran receive Neomycin systemically. They found that the nephrotoxic and ototoxic adverse reactions to Neomycin applied only

to its use systemically and that the only adverse reaction in the package literature with regard to topical use was the occasional production of a sensitivity reaction on abraded skin. The topical use of Neomycin, particularly in solution, as in the present case, was common practice at the hospital and adverse reactions were unknown from experience. Because of the topical use and because in this case a solution was run into the wound through one tube and out the other, with a small quantity of solution in contact with tissue at any one time, the Board was of the opinion that there was no relationship between the use of Neomycin and the claimed hearing loss and that there was no evidence of carelessness, accident, negligence, lack of proper skill, error in judgment or other fault on the part of the Government.

There was received a copy of a letter, dated in December 1969, from the United States Department of Health, Education and Welfare. This showed that "polycillin" was the trade name for ampicillin and was not considered neurotoxic; and that neurotoxicity and ototoxicity were associated as adverse reaction to Neomycin when given parenterally.

During Veterans Administration hospitalization from January to February 1970, primarily for an unrelated condition, an audiogram showed decreased hearing acuity in each ear at the 2,000 to 8,000 frequency levels. The final diagnoses included sensorineural deafness.

Harold F. Schuknecht, M.D., reported in January 1970 that Neomycin was a very ototoxic drug which could be absorbed into the system when used as an irrigating solution.

At a hearing held before the Board of Veterans Appeals in July 1970, the veteran reiterated his contention that his defective hearing was the result of the use of Neomycin during hospitalization.

J. Fred Parkyn related in October 1970 that he had known the veteran since June 1966; and that he knew that the veteran had no difficulty with his hearing prior to his hospitalization in April 1968.

William F. Demming stated in October 1970 that he and two friends visited the veteran on or about the last Sunday in April 1968 and the veteran could hear everything that was said; and that in the middle of 1969 the veteran's hearing was so bad that he could not tell what was going on at lodge meetings.

There were received statements, dated in November 1970, from acquaintances of the veteran to the effect that he had no difficulty with his hearing prior to his illness on or about April 1968.

Joseph J. Soma, M.D., reported in November 1970 that he examined the veteran in August 1968; that audiometric examination revealed bilateral, sensorineural hearing loss, involving high tones; that he was placed on antivert for a trial period and was to return in one week; that there was no followup visit and no further evaluation.

S. C. Mazaleski, M.D., related in November 1970 that he treated the veteran from June to August 1968 for bilateral deafness, cause undetermined.

Thomas E. Pratt, Technical Manager of the Squibb Professional Services Department, stated in December 1970 that special study groups of the National Academy of Scientists—National Research Council had been evaluating drugs marketed prior to 1962; that one of these committees had questioned the value of intraperitoneal instillation of solutions of Neomycin—Sulfate because of the great risk of respiratory depression associated with such use; that they also found topical Neomycin of doubtful effectiveness with a high incidence of hypersensitivity, making this use hazardous; and that on this basis the Food and Drug Administration suggested certain revisions in prescribing information for Neomycin Sulfate Powder.

A report of Veterans Administration field examination dated in February 1971, revealed that the field examiner reported that Dr. Soma stated that after examining the veteran in August 1968, he concluded that his hearing

problem was a result of his employment in the machine shop. Dr. Soma reportedly planned to treat the veteran along such lines, but the veteran never returned for further treatment. The field examiner also related that Dr. S. Mazaleski stated that he had treated the veteran for colds in the past; that he did not treat ears and referred the veteran to Dr. Soma; and that he had no record on the veteran.

The veteran was examined by the Veterans Administration in March 1971. Audiometric testing disclosed bilateral, sensorineural hearing loss involving high tones.

Dr. Soma stated in June 1971 that he did not believe that the veteran's defective hearing was the result of acoustic trauma; and that, in his opinion, the veteran suffered from severe sensorineural hearing loss due to Neomycine absorption.

Mr. Paul Anapol, the veteran's representative, appeared at formal hearings before the Board of Veterans Appeals in January and March 1972. On the latter occasion there was submitted a statement from R. J. Bednarczyk Manager, Safety and Insurance, RCA. He reported that the veteran had been employed as a machinist by RCA; that in January 1970 he was granted medical leave; that in the event he could not return to work by January 1972, his employment would be terminated; and that considering the medical verification of the veteran's hearing condition that had been received, it was entirely possible that this might happen. There was also submitted a copy of a letter, dated in September 1971, from Dr. Sataloff. He stated that he first saw the veteran in November 1968 when he complained of having hearing loss and ringing and humming for about 3 or 4 months previously; that he also had marked hearing loss which seemed to be getting progressively worse; and that a review of his history and findings from the Veterans Administration indicated that he received Neomycin by irrigation; that the absorption of this Neomycin was the cause of his hearing loss; and that the diagnosis was bilateral nerve deafness due to ototoxic drug administration.

THE LAW AND REGULATIONS

Where a veteran suffers an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or examination, and such injury or aggravation results in additional disability, compensation may be awarded in the same manner as if such disability were service connected. Compensation may not be payable for either the usual or the unusual result of approved medical care properly administered, where the evidence does not show that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or other instances of indicated fault on the part of the Veterans Administration. (38 U.S.C. 351; 38 C.F.R. 3.358)

DISCUSSION AND EVALUATION

Before compensation may be paid in this case under 38 U.S.C. 351 and 38 C.F.R. 3.358, it must first be established that additional disability or aggravation of a pre-existing disability resulted during hospitalization by the Administration as a proximate result of "indicated fault" on the part of the Veterans Administration. Such determination must be made on the objective medical findings prior and subsequent to hospitalization, and the veteran's complaints are not necessarily determinative of the question.

The principal question to be decided herein is whether the use of Neomycin was other than in accordance with approved medical standards and techniques carried out by duly qualified and trained hospital personnel. The evidence in the case clearly demonstrates that the veteran had osteomyelitis of the right femur prior to Veterans Administration hospitalization on April 2, 1968. During hospitalization he was placed on Neomycin irrigation. Defective hearing unfortunately may have resulted from this treatment. However, this Administration is not in the position of an absolute insurer against all possible side-effects which may occur as a result of medical treat-

ment. Under applicable legal provisions, the veteran would not be entitled to service connection for defective hearing resulting from use of Neomycin unless such treatment was not administered in accordance with acceptable medical standards and techniques. After reviewing the pertinent reported findings during and subsequent to the Veterans Administration hospitalization in April 1968, it is the conclusion of the Board that the evidence does not show negligence, lack of proper care, lack of skill or other indicated fault on the part of this Administration.

FINDINGS OF FACT

1. Mr. Kubrick was placed on Neomycin irrigation by the Veterans Administration during hospitalization in April 1968 for osteomyelitis of the right femur. Beginning in approximately June 1968 defective hearing was noted.
2. Sensorineural deafness was diagnosed during Veterans Administration hospitalization from January to February 1970.
3. There is evidence to show that the defective hearing may have been caused by the Neomycin irrigation.
4. The treatment and care afforded the veteran in connection with the use of Neomycin was administered by duly qualified and trained personnel, in accordance with acceptable medical practices and procedures and negligence, error in judgment or other indicated fault is not shown.

CONCLUSION OF LAW

The defective hearing did not occur under circumstances contemplated by Section 351, Title 38, United States Code.

DECISION

Entitlement to service connection for defective hearing under 38 U.S.C. 351 is not established. The benefit sought on appeal is denied.

/s/ H. J. Schlegel
H. J. SCHLEGEL

/s/ John G. Higgins
JOHN G. HIGGINS, M.D.

/s/ I. Kleinfeld
I. KLEINFELD

[SEAL] VETERANS ADMINISTRATION
OFFICE OF GENERAL COUNSEL
Washington, D.C. 20420

April 13, 1973

IN REPLY
REFER TO:

021
C 17 381 329
KUBRICK, William A.

CERTIFIED MAIL

Mr. Michael I. Luber
Attorney at Law
1420 Walnut Street
11th Floor
Philadelphia, Pennsylvania 19102

Re: Administrative Tort Claim—
William A. Kubrick

Dear Mr. Luber:

This is in reference to the above-captioned administrative tort claim filed with this agency.

A review of the facts and circumstances connected with this case reveals that the claim of Mr. Kubrick was not filed within the two-year statute of limitations provided by section 2401(b) of the Federal Tort Claims Act, 1346(b), 2671, et. seq. Accordingly, this agency is without jurisdiction to consider the claim.

Section 2401(b) provides that a tort claim administratively denied may be presented to a federal district court for judicial consideration. Such suit may be initiated within six months after the date of mailing of the notice

of denial. For purposes of this provision, this letter will constitute a denial of this claim.

Sincerely yours,

/s/ John H. Kerby
JOHN H. KERBY
Assistant General Counsel

BOARD OF VETERANS APPEALS

WASHINGTON, D.C. 20420

Docket No. 75-10 765

Date—July 16, 1975

FINDINGS AND DECISION (RECONSIDERATION)

IN THE APPEAL OF

WILLIAM A. KUBRICK
C 17 381 329

THE ISSUE

Entitlement to compensation under the provisions of Title 38, Section 351, United States Code, for defective hearing.

REPRESENTATION

Appellant represented by: Paul R. Anapol, Attorney

CONSULTATIONS BY THE BOARD

Roger K. Bauer, Staff Legal Adviser

ACTIONS LEADING TO PRESENT APPELLATE STATUS

This is a reconsideration of a case in which the issue of entitlement to compensation under the provisions of Title 38, Section 351, United States Code, for defective hearing was previously before the Board, and in a decision dated August 9, 1972, was denied. The decision held the veteran's defective hearing may have been caused by Neomycin irrigation administered during treatment at an Administration medical facility, the treatment and care afforded the veteran was by duly qualified and

trained personnel in accordance with acceptable medical practices and procedures and negligence, error in judgment and other indicated fault were not shown.

CONTENTIONS

The appellant and his attorney contend, in substance, that the veteran was hospitalized at an Administration medical facility during which time he was administered medical care which was negligent and careless in administration and as a result thereof, he sustained a severe and permanent bilateral nerve deafness. It is asserted, in particular, that the drug Neomycin was provided the veteran in such an improper manner as to eventually result in the hearing loss.

THE EVIDENCE

The Board of Veterans Appeals decision dated August 9, 1972, contains a summary of the material evidence pertinent to the claim at that time. Copies of the decision were furnished the interested parties, and that decision is incorporated by reference. The material therein will not be restated or enlarged upon herein except for purposes of clarification.

Additional medical reports have been received which bear upon the issue presented. Joseph Sataloff, M.D., in correspondence to the appellant's attorney dated in September 1971 opined that the veteran had bilateral nerve deafness due to ototoxic drug administration.

Linwood F. Tice, D.Sc., provided the opinion the claimant was furnished a grossly excessive dosage of Neomycin in a manner conducive to systemic absorption. The amount documented as administered was very large for such a hazardous antibiotic.

Thomas Gain, M.D., reported that after a review of the facts, the method of administration of the dosage used of the Neomycin was such that the standard of care required was not adhered to and that the use of the Neomycin resulted in hearing loss.

W. J. Russell Taylor, M.D., Ph.D., reported that the systemic absorption of Neomycin can cause ototoxicity, and that the manner in which the Neomycin was administered to the veteran at the Veterans Administration hospital was such that high systemic absorption could be expected.

Lord Lee-Benner, M.D., reported that the veteran had undergone personality changes following the development of bilateral nerve deafness.

The manager of the RCA facility where the veteran was employed as a machinist reported that the veteran would be terminated from his employment if he did not return to work.

Saul S. Leshner, Ph.D., submitted a statement as to the veteran's loss of earning power as a result of his hearing loss.

THE LAW AND REGULATIONS

The unanimous decision of the members of a section of the Board of Veterans Appeals is final, except that the Board may on its own motion correct an obvious error in the record. (38 U.S.C. 4003, 4004)

Reconsideration of an appellate decision may be afforded by the Board of Veterans Appeals for obvious error of fact or law upon allegation by the claimant or on the Board's own motion. (38 C.F.R. 19.148)

When a decision of the Board is to be reconsidered, the Chairman may assign one or more sections to participate with the members signatory to the decision being reconsidered. (38 C.F.R. 19.152)

When a veteran suffers an injury, or aggravation of an injury, as a result of hospitalization, medical or surgical treatment or examination and such injury or aggravation results in additional disability, compensation may be awarded in the same manner as if such disability were service connected. (38 U.S.C. 351)

Compensation may not be payable for either the usual or unusual results of approved medical care properly

administered, where the evidence does not show that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment or other instances of indicated fault on the part of the Veterans Administration. (38 C.F.R. 3.358(c) (3))

The effective date of an award based on a finding of clear and unmistakable error in a prior decision will be the date benefits would have been payable if the corrected decision had been made on the date of the revised decision. (38 C.F.R. 3.105, 3.400(k))

DISCUSSION AND EVALUATION

An enlarged panel of two sections of the Board of Veterans Appeals has reviewed the entire evidence of record, including the medical reports, the various expert opinions and the contentions. On the basis of the material available to the Board at the time of the August 1972 decision, a determination was made which involved an element of judgment and opinion. To reverse that decision would require a finding that it was clearly and unmistakably erroneous at the time it was promulgated.

The Board has again reviewed the entire record of evidence. Recently submitted materials are, for the most part, cumulative in nature to those previously considered; however, certain technical points adduced have added perspective to the evidence already of record.

The Board's finding that the veteran's defective hearing may have been caused by the Neomycin irrigation stands and is supported by the evidence. However, a further in-depth review supports the claimant's assertions of improper administration of the drug. The amount utilized was of such quantity, when considered with the size and depth of the wound and the form of drug administration, as to support a finding the procedure deviated from accepted medical practices and procedures, indicating fault on the part of the Veterans Administration based on the data previously on file.

FINDINGS OF FACT

1. Mr. Kubrick was placed on Neomycin irrigation by the Veterans Administration during hospitalization in April 1968 for osteomyelitis of the right femur.
2. Defective hearing was noted in about June 1968 and sensorineural deafness was diagnosed during Veterans Administration hospitalization from January to February 1970.
3. Defective hearing may have been caused by the Neomycin irrigation.
4. The benefit in issue was denied in Board of Veterans Appeals decision promulgated August 9, 1972, which decision now appears to have been erroneous.
5. There was fault on the part of the Veterans Administration in the manner of Neomycin irrigation which is reasonably determined to have resulted in sensorineural hearing loss.

CONCLUSION OF LAW

The prior decision of the Board of Veterans Appeals in August 1972 involved obvious error of fact in denying compensation under the provisions of Title 38, Section 351, United States Code, for defective hearing. (38 U.S.C. 351, 4003, 4004; 38 C.F.R. 3.358, 19.148)

DECISION

Entitlement to compensation for defective hearing under 38 U.S.C. 351 has been established. The appeal is allowed.

/s/ H. J. Schlegel
H. J. SCHLEGEL

/s/ T. H. Wells
T. H. WELLS, M.D.

/s/ I. Kleinfeld
I. KLEINFELD

/s/ Samuel W. Warner
SAMUEL W. WARNER

/s/ P. M. Fiandaca
P. M. FIANDACA, M.D.

/s/ K. J. Wells
K. J. WELLS

[2-72]

TESTIMONY OF WILLIAM A. KUBRICK

* * *

BY MR. KUBY:

Q I think we last questioned you, Mr. Kubrick, about your being discharged from the Veterans Hospital in Wilkes-Barre at the end of April 1968; is that correct?

A Yes.

Q Now after you were discharged from the hospital, what did you do?

A I went to my family doctor.

Q And was that Dr. Mazaleski?

A Yes, it was.

Q Did you return to work right away? Did you stay home for any period of time?

A I stayed home for about two months before I went back to work.

Q And during the time you were home did you have any trouble with the leg that had been operated upon in the Veterans Hospital?

A No.

Q Did that in fact clear up?

A Yes, it did.

Q When you went back to work for RCA in Dunmore, did you have any trouble with your leg or with your hearing?

[2-73] A No.

Q Did there come a time, Mr. Kubrick, that you began to experience problems with your hearing?

A I started experiencing problems with my hearing in June of '68. Approximately two months after my discharge from the hospital.

THE COURT: What was the exact date of discharge?

MR. KUBY: April 30, 1968.

BY MR. KUBY:

Q Can you tell us what these problems with your hearing were when you first began to have that experience?

A Well, in June was the first time that I had any problem with my hearing. And it started out with a ringing in my ears.

Q Was it a ringing which was there all the time or did it come and go?

A Once it came it stayed.

Q Did it come in both ears at the same time or did it come in one ear before it came to the other?

A It started in my left ear first.

Q And how long did it take before it got to the other ear?

A I would say about a month.

Q Mr. Kubrick, once you began to experience the ringing in your ears were you able to hear conversations?

A Yes, I was.

Q Did there come a time when your ability to hear sounds [2-74] or voices began to be diminished?

A Yes, it was.

Q When did that begin?

A Well, I started getting the loss of the hearing part it must have been about August of '68. It was very slight losing of the voices. They were getting dimmer, less audible.

Q Did you tell anyone about this problem?

A Yes, I went to see Dr. Mazaleski.

Q Did you tell your wife and your family about the problem?

A Yes, I did.

Q About when did you go to see Dr. Mazaleski about the problem?

A In June and July of 1968.

Q Why did you go to him?

A Because he was my family doctor and I went to him to see what was wrong.

Q Why didn't you go back to the Veterans Hospital?

A Why didn't I what?

Q Why didn't you go back to the Veterans Hospital?

A Because the Veterans Hospital released me in his care. So that's why I went.

Q When the ringing began in your ears did you have any idea or thought where it was—what caused it or what it was coming from?

A No.

Q When you went to Mr. Mazaleski what did you tell him?

[2-75] A I told him I was experiencing the ringing in my ears.

Q What, if anything, did he do for you?

A He put purple stuff in my nose and treated. He thought I might have had a cold in my head or a virus and then when that wasn't true then he sent me to an ear specialist.

Q How many times did you see Dr. Mazaleski for the ringing in your ears and your hearing problem?

A The exact number of times, I don't know. I went for two months to see him.

Q Did you ever tell him anything about being hospitalized in the Veterans Hospital in April of 1968?

A Well, when the hospital released be in his car, well, naturally I showed him the scar in my leg.

Q Were you asked by him concerning anything about the treatment you received at the Veterans Hospital?

A No.

Q Did you specifically tell him or were you asked about any drugs that you received in the hospital?

A No.

Q Were you referred by Dr. Mazaleski to any other physician because of your hearing problem?

A Dr. Soma he sent me to.

Q When did Dr. Mazaleski send you to Dr. Soma?

A I believe it was in August of '68.

Q Where were Dr. Soma's offices located?

[2-76] A Scranton, Pennsylvania.

Q Is he a hearing specialist?

A Yes.

Q Did you go to Dr. Soma?

A Did I what?

Q Did you go to Dr. Soma?

A Yes, I did.

Q And was that in 1968, August or thereabouts?

A Yes, I believe it was August.

Q Did you go with anyone? Did anyone go with you, Mr. Kubrick?

A Oh, yes, my wife did.

Q How many times did you see Dr. Soma in 1968?

A Once.

Q What, if anything, did you tell Dr. Soma when you went to see him?

A I just told him I have a loss of hearing.

Q What did Dr. Soma do for you?

A He checked my hearing with earphones for different pitches of tones.

Q Did he do anything else?

A No. He just told me that I had bilateral nerve deafness.

Q Did he question you concerning your hospitalization at the Veterans Hospital in April?

A No, he did not.

[2-77] Q Did he question you concerning any drugs that you may have taken?

A No.

Q Did you tell him about any drugs at that time?

A No.

Q Did he make any recommendations to you at the time of your examination when he told you you had bilateral nerve deafness?

A All he gave me was a prescription to get filled and told me to come back in a month.

Q Did he tell you what bilateral nerve deafness was?

A Well, at the time, no, he just said bilateral nerve deafness.

Q Did you have any conversation with him as to what might have caused it?

A No.

Q Did you ask him?

A No.

Q Did he tell you?

A No.

Q Were you still working?

A Yes, I was.

Q Were you able to do your job as a machinist with your condition as it was in the summer of 1968?

A Yes.

Q Now, did you get any treatment after Dr. Soma or did you [2-78] go back to see Dr. Soma as he suggested?

A No, I did not.

Q Did you go to see any other physician?

A Yes, I went down to Geisinger Medical Center to see Dr. Cole.

Q Geisinger Medical Center is in Danville; is that correct?

A Yes.

Q What made you go to see Dr. Cole?

A Because I just didn't like the opinion of Dr. Soma.

Q Were you referred to Dr. Cole by any doctor or by anyone?

A Yes, I was.

Q By whom?

A By a neighbor.

Q When did you go to see Dr. Cole?

A I believe it was in September.

Q Of 1968?

A Yes.

Q Would you tell us what you told him at the time of your examination?

A I just told him that I was having a hearing loss.

Q Did he take any history from you?

A Yes, he did.

Q Did that history include the hospitalization that you had at the Veterans Hospital in April?

A Yes, it did.

[2-79] Q Did he ask you anything concerning any drugs or medication that you received?

A No.

Q Did you tell him about any drugs or medication that you received?

A No, I did not.

Q What did Dr. Cole do for you or what was his examination?

A He had a technician put me in a room and put ear-phones in my ears and test me with different tones and talking to me.

Q How long did the examination last?

A Approximately between a half hour to 45 minutes I would say.

Q As a result of the examination did you have any discussions with Dr. Cole as to what your problem was?

A Yes, I did.

Q And what, if anything, did he tell you?

A He told me I had a bilateral nerve deafness and that a hearing aid or surgery would not help me.

MR. HOLL: Objection.

THE COURT: Well, I will overrule the objection, Mr. Holl, because I deem this evidence offered not for hearsay purpose. That is to prove the truth of the matter therein asserted, namely, that he had bilateral nerve deafness. Although I would note parenthetically whatever the ultimate diagnosis is, I don't think there is any dispute about it or I suspect [2-80] there is no dispute about it. But I accept it or I receive it because I don't conceive it as being used for a hearsay purpose but rather on the issue of what Mr. Kubrick knew or didn't. And more precisely as it related to the statute of limitations question.

I take it that is the purpose for all this.

MR. KUBY: That's correct, sir.

BY MR. KUBY:

Q What did Dr. Cole tell you—I think you answered the question, I believe.

THE COURT: I think he said he had bilateral nerve deafness.

BY MR. KUBY:

Q Did Dr. Cole tell you anything concerning what was the cause of it?

A No, he did not.

Q Did you question him?

A No, I did not.

Q About what was the cause.

A No.

Q Did you have any idea about what was the cause of your deafness when you went to see Dr. Cole?

A No.

Q Did you make any arrangements for further treatment with Dr. Cole?

[2-81] A No. He told me to come back in about six months.

Q Did he give you any medicine or suggest anything to you?

A No. He just said I would have to start looking at people directly when I am talking to them or they are talking to me.

Q On the day you left Dr. Cole did you get any other medical treatment?

A After I left Geissinger Medical Center I was disgusted because he said nothing could help me. So I did stop in the Veterans Administration Hospital and Dr. Fischhoff, who is the ear and hearing specialist there, did check my hearing. And after the hearing he did give me a prescription to pick up at the pharmacy.

MR. KUBY: I am marking a bottle as P-1.

BY MR. KUBY:

Q Mr. Kubrick, I show you the bottom which has been marked P-1 and ask you if you can identify that bottle.

A Yes, this is a bottle I got from Dr. Fischhoff at Wilkes-Barre Veterans Hospital.

Q When you went to see Dr. Fischhoff on that day did he do a hearing test?

A Yes, he did.

Q Was the hearing test done in the same hospital where you had been in April of 1968?

A Yes, it was.

Q Do you know whether or not at the time he did the hearing [2-82] test he had your records in front of him?

A Yes, he did.

Q Did he say anything to you concerning the cause of your hearing problem?

A No, he did not.

Q Did he say anything to you concerning any drugs or medication that you had received as being related to your hearing problem?

A No, he did not.

Q Did you question him or ask him what was the cause of your hearing problem?

A No, I did not.

Q Did he ask you to come back?

A No, he did not.

Q What, if anything, did he tell you about the bottle with the liquid in it that he had prescribed for you?

A Well, he sent me down with the prescriptions to the pharmacy to pick it up and start taking it.

MR. HOLL: I object.

THE COURT: Overruled.

BY MR. KUBY:

Q How were you to take it?

A Like it says on the bottle here, twice daily and a glass of water.

Q And that was to be swallowed?

[2-83] A Yes.

Q Did you follow those directions?

A I did for a while.

Q Did it change your hearing situation?

A No, it didn't.

Q What did you next do, Mr. Kubrick, after that day when you went to see Dr. Cole at Geissinger and went to see this doctor at the Veterans Hospital, what did you next do concerning your hearing after that?

A Well, when we were home another neighbor told us about Dr. Sataloff in Philadelphia that was a real specialist in the field. And we got the address and set up an appointment with Dr. Sataloff and we did go to see him. I think it was in October or November. I'm not sure which month.

Q Of 1968?

A Yes.

Q When you went to see Dr. Sataloff what was the condition of your hearing as best you can recall?

A It was getting worse.

Q Could you still hear voices?

A At that time, yes.

Q Can you still hear sounds?

A Yes.

Q Could you hear a telephone ringing?

A No, I don't remember hearing a telephone ringing then.

[2-84] Q Can you hear a telephone ringing now?

A No.

Q Can you hear the siren from an ambulance?

A All it is is noise. I do hear loud sounds and my ears pick it up. And it starts my ears ringing more. But there would be a lot of sound. They come to me as noise.

Q Can you hear the horn of an automobile?

A No. It would be just like a loud sound. You would hear a loud sound but you wouldn't understand it or know what it is.

THE COURT: Are you allowed to drive a car?

MR. KUBY: Yes, he is.

BY MR. KUBY:

Q Are you allowed to drive an automobile?

A Yes.

Q Are there any special precautions taken in your household when you drive an automobile?

A No. When I am driving they don't try to make any noise to disturb me because I am always looking where I am going and looking in the mirror.

Q When you went to see Dr. Sataloff here in Philadelphia did you give him a history?

A I told him I was in the Veterans Administration Hospital. But I couldn't give him a complete history. So he told me he would send for the files in the Veterans Administration Hospital.

[2-85] Q Did you have any discussions with him concerning the medication that was given to you at the Veterans Hospital?

A At that time, no.

Q Did you have any discussions with Dr. Sataloff concerning the cause of your hearing problem?

A At that time, no.

Q Did you undertake a course of treatment with him?

A Yes, I did.

Q What did he do for you? First of all, what did he do for you on that first day?

A He told me on the first day that he was going to send for the hospital records at the Veterans Administration Hospital and then he could give me more clearly what—if there was anything there that could have caused it.

Q Did you then go back to see Dr. Sataloff?

A Yes, I went to see him quite often.

Q Did there come a time with Dr. Sataloff that you had any discussions concerning what might have caused your hearing problem?

A Yes. After he received the hospital records he did discuss with me and did tell me that there was a possibility that the drug neomycin could have caused my hearing loss.

Q Do you know what date that was?

A That was early in 1969. I can't tell the exact month.

Q Do you know whether Dr. Sataloff received the full hospital [2-86] records or only a portion of the hospital records at that time?

MR. HOLL: Objection.

THE COURT: Objection sustained.

BY MR. KUBY:

Q Well, do you know how much of the hospital records the doctor received?

MR. HOLL: Objection.

THE COURT: Objection sustained.

A He told me he received a minimum amount.

MR. HOLL: Could I have that last response stricken?

THE COURT: I didn't hear it. It is stricken.

BY MR. KUBY:

Q Mr. Kubrick, after that conversation what did Dr. Sataloff do for you as far as treatment?

MR. HOLL: Objection as to leading.

A He gave me prescriptions to fill and to take.

THE COURT: Objection overruled.

Ask if he knows what season it was or what month it was when Sataloff told him what he discussed about doing.

BY MR. KUBY:

Q The judge would like to know, Mr. Kubrick, what season or month, if you can detail it, it was in 1969 when the doctor told you about the possibility of I think you said a drug causing your [2-87] hearing problem.

A That it was possible to cause my hearing problem.

Q Do you know what month that was?

A No. I know it was in the early part of '69. It is so far back that the month I can't say right now.

Q When he told you that how did you feel or what did that mean to you?

A Well, I felt depressed because I wanted my hearing cleared up. And he just told me that it could not be and it would get worse. The ringing he said he would try to get rid of that too, which I still have. It has not gone away.

Q When he told you that it was possible that the drug caused your hearing loss, what did that mean to you?

A Just that it was unfortunate the drug was causing my hearing loss. Nothing else.

Q Mr. Kubrick, after this conversation with Dr. Sataloff in which he told you about the possibility, what, if anything, did you do?

A Well, I went down to the Wilkes-Barre Veterans Hospital—not Veterans Hospital, Wilkes-Barre Veterans Building in Wilkes-Barre, Pennsylvania, and went in to see somebody about my hearing. I went to see the re-

ceptionist there which referred me to a DAV Personnel because I was a member of the DAV, that they sent me to him.

THE COURT: By DAV you mean disabled American [2-88] veteran, I take it?

MR. KUBY: That's correct.

BY MR. KUBY:

Q You mean DAV is disabled American veteran?

A Yes.

THE COURT: Mr. Kuby, ask Mr. Kubrick if he can remember Dr. Sataloff's precise words when he told him there was a possibility that the drug neomycin could have caused his hearing loss.

BY MR. KUBY:

Q The judge wants to know what you remember were Dr. Sataloff's precise words when he told you that the drug neomycin could have possibly caused your hearing loss.

A He did tell me that it could possibly be caused by the drug neomycin. That is all.

Q Mr. Kubrick, in 1968 or 1969 did you know what the term malpractice meant?

A Well, to me malpractice I at that time only knew like if somebody took out an organ of a person that that was malpractice.

Q Did you know what the term negligence meant or carelessness?

A I know what the word means. If you walk outside and you hit somebody with a bottle accidentally or something like that, it is negligent on your part like that.

Q When Dr. Sataloff spoke to you in 1969 and told you about the possibility of the drug neomycin causing your hearing loss, [2-89] did he say anything about any carelessness or negligence or malpractice at that time on the part of any doctor?

MR. HOLL: Objection.

A No, he did not.

THE COURT: Overruled.

BY MR. KUBY:

Q Now you say you went into the Veterans Building or Government building in Wilkes-Barre?

A Yes.

Q And for what purpose did you go there?

A To file a claim for service-connected compensation.

Q For what?

A For my loss of hearing.

Q When had you decided to do that?

A That was in April of 1969 I believe it was. That was after Dr. Sataloff told me that there was a possibility.

Q How long after the conversation with Dr. Sataloff did you decide to go and file a claim for Veterans benefits?

A That was about two months, I would say.

Q I show you, Mr. Kubrick, a document which has been marked P-2 entitled Statement in Support of Claim. Is that the claim which you filed?

A I didn't get that.

Q Is that paper a copy of the claim which you filed that day, that you have just described, in Wilkes-Barre? [2-90] A Yes.

Q Can you read that?

A Well, it is hard to read because I did not fill it out. Mr. Dudish filled it out himself. He wrote it and I just signed it.

Q Well, can you read to the best of your ability?

A Please consider this as a supplemental claim for—it looks like bilateral. It is hard for me to read this.

Q Let me read it and see if you agree with me and, Mr. Holl, will you read along with me.

MR. HOLL: I may have a clearer copy.

THE COURT: Gentlemen does it say what it says it says?

MR. HOLL: I would think, Your Honor, the document speaks for itself.

THE COURT: So would I.

BY MR. KUBY:

Q Is that your signature on the document?

A Yes, it is my signature.

THE COURT: Why don't you read it into the record, Mr. Kuby, so long as you and Mr. Holl can agree as to what it says.

MR. HOLL: I think it is perfectly understandable.

THE COURT: If it is legible let's read it into the record.

[2-91] MR. KUBY: Please consider this as a supplemental claim for a bilateral defective hearing condition as the result of medication prescribed during my period of hospitalization at the VAH Wilkes-Barre, Pennsylvania in April 1968. Since my period of hospitalization at the VAH-W-B, Pennsylvania I have been receiving treatment from various physicians and since October 1968 I have been receiving treatment by Dr. Joseph Sataloff, 1721 Pine Street, Philadelphia, Pa., and he is of the opinion that as the result of medication prescribed a resultant hearing condition occurred.

It would be appreciated if your office would write direct to Dr. Joseph Sataloff in further development of my claim and I am sure the doctor will cooperate.

Is that correct, Mr. Holl?

MR. HOLL: Yes, I believe so. Except I think the word prescribed ends with result.

Now, maybe you are right. Yes, what you have read is correct.

BY MR. KUBY:

Q Mr. Kubrick, after this document was filed—

THE COURT: Wait a minute. You better trace the document. It was prepared by the DAV man, what happens to it, and so on.

BY MR. KUBY:

Q This document that is in front of you, P-2, was prepared [2-92] by a Mr. Dudish.

A Yes, it was.

THE COURT: How do you spell Dudish?

MR. KUBY: D-u-d-i-s-h.

BY MR. KUBY:

Q Was it prepared in your presence?

A Yes, it was.

Q And did you read it?

A I tried to read it.

Q Did you sign it?

A Yes, I did.

Q Do you know what happened to that document after you signed it?

A He said he was going to send it to Philadelphia.

MR. HOLL: Objection.

THE COURT: All right. I'll sustain the objection. You can re-ask the question.

BY MR. KUBY:

Q Well, did you do anything with the document?

A No.

THE COURT: I will reverse my ruling on it. He may answer. This may relate to estoppel claims and that kind of thing.

BY MR. KUBY:

Q Mr. Kubrick, do you know what happened to the document after [2-93] you signed it?

A As far as I know it was sent to Philadelphia.

THE COURT: Tell Mr. Kubrick to look at me now.

MR. KUBY: Mr. Kubrick, would you look at the judge.

BY THE COURT:

Q Whose words were used in the form? Were they your words or Mr. Dudish's?

A Some was Mr. Dudish's and some was ours.

Q What did you tell Mr. Dudish?

A I told Mr. Dudish what Dr. Sataloff told me. That it was his opinion the drug neomycin could have possibly caused my hearing loss.

Q Did you tell Mr. Dudish what to write or did he decide what to write based upon what you told him?

A What we told him was the basis we wrote the letter.

Q Who was with you.

A My wife.

BY MR. KUBY:

Q Mr. Kubrick, how did you get to Mr. Dudish?

A Well, I was a member of the DAV. So they told me to go down to the Veterans Administration Building in Wilkes-Barre.

Q And once you got there someone sent you to Mr. Dudish?

A Yes.

Q Were you still working at that time?

[2-94] A Yes, I was.

Q What occurred with your claim?

MR. HOLL: Objection.

MR. KUBY: Wait until I finish the question.

BY MR. KUBY:

Q Mr. Kubrick, do you know what occurred with your claim after it was filed in April of 1969?

A It was denied.

Q How do you know it was denied?

A They sent me a statement of the case.

THE COURT: Don't you have that in evidence?

MR. KUBY: We have all of these things. All of these are Government records.

THE COURT: Why don't you use them seriatim?

MR. KUBY: I think we can stipulate and save time, Mr. Holl, that your document No. 5, which I have marked as P-3, a letter dated August 4, 1969, was an acknowledgement of the receipt of the claim by a Mr. Melidosian. And the next document which you have labeled as No. 6 in your packet which was presented to the Court and I have marked as P-4 was the rejection of the claim dated August 11, 1969.

THE COURT: You have one document there or two?

MR. KUBY: I have two documents.

THE COURT: What was the first one?

[2-95] MR. KUBY: The first one was, if you have your packet there, No. 5.

The next document, which is marked as No. 6 on the bottom, which I have marked as P-4, is the rejection.

THE COURT: They are out of order. I have the August 4th acknowledgement.

MR. HOLL: That's our No. 5 and their No. 3.

THE COURT: Who is the rejection signed by?

MR. KUBY: It is signed by three doctors.

THE COURT: Who is the rejection signed by?

MR. KUBY: It is signed by three doctors.

THE COURT: That is August 11, 1969, report of board action.

MR. KUBY: We have another document which has been marked as P-5, which is not included in that packet, which is a letter from the Veterans Administration Center, Philadelphia, signed by R. J. McCauley, Adjudication Officer, dated December 5, 1969, which is addressed to Mr. Kubrick and which is a disallowance of his claim.

BY MR. KUBY:

Q Mr. Kubrick, I show you this document which has been marked P-5. Do you remember receiving that?

THE COURT: Which is this now?

MR. KUBY: This is the letter from the Veterans Administration which reads as follows:—

THE COURT: Who is it signed by?

MR. KUBY: R. J. McCauley.

[2-96] BY MR. KUBY:

Q Mr. Kubrick, the letter, P-5, states:

We have carefully reviewed your claim for service connection for defective hearing. It has been determined that your alleged hearing loss is not medicinally or medically attributable to your recent hospitalization at the VA Hospital, Wilkes-Barre, Pennsylvania. Accordingly, your claim is disallowed. You will continue to receive \$43 monthly for your back condition.

What did this letter mean to you, Mr. Kubrick?

A To me it meant that the Board of Physicians that had the meeting that made the decision made a mistake. That it was the drug neomycin could have caused my hearing loss.

THE COURT: Let me see the letter that you just read.

(Handing to the Court.)

BY MR. KUBY:

Q Mr. Kubrick, when you received that letter that we have just read, did you also receive this document which has been marked as P-4, the clinical record?

A No.

Q Am I correct, Mr. Kubrick, that when you read this letter you disagreed with this letter?

A Yes, I did.

THE COURT: In what respect?

[2-97] BY MR. KUBY:

Q In what respects did you disagree with it?

A Well, in that letter to me because it was medical personnel that made that decision, I assumed it was in my mind a medical error. That they made a wrong decision. That the neomycin did cause my hearing loss which I was trying to tell them it did and they telling me that it wasn't.

BY THE COURT:

Q Mr. Kuby asked you what the letter meant to you. Now you have told me that you disagreed with the letter; is that right?

A Yes.

Q Now, what did the letter mean to you? What did you understand by this letter? In other words, I am not asking you what your conclusion was as to whether the three documents were right or wrong—Mr. McCauley's letter. I am not asking you whether you thought McCauley was right or wrong but what you understood by his letter.

Now Mr. Kuby will show you the letter again.

A I believe they erred in their decision. They said it could not happen medically. In other words, it was impossible for it to happen to me. And I disagreed with that.

Q But my question is what did you understand them to be saying. What did you understand the letter to mean, not what your conclusion was as to agreeing or disagreeing with it but what [2-98] did you understand the letter to mean?

A That it could not cause my hearing loss.

BY MR. KUBY:

Q Now after you received that letter and you disagreed with it, as you have stated, what did you do?

A Well, we filed an appeal to it.

THE COURT: Ask him who "we" is.

A After we received the statement of the case we filed an appeal to it.

BY MR. KUBY:

Q I don't understand you.

A I believe at that time they did send us a statement of the case concerning it. But we had to answer different questions. I am not sure if that was the time.

MR. KUBY: I am referring to Document No. 3 in that packet, sir, which I have now marked as P-6.

BY MR. KUBY:

Q Mr. Kubrick, on or about September 25, 1969, did you file another document in connection with your claim, and specifically I show you a document marked P-6.

A Yes.

Q Why did you file that?

A This was just a statement in support of the claim that I originally made.

Q Would you read it, please?

[2-99] A Out loud?

Q Yes, sir.

A I received a decision of August 1969 denying service connected for my claim for the loss of my hearing

and the ear condition I now have. I am dissatisfied with this decision and I feel it is unjustified.

On April 2nd, 1969 I was admitted to the Wilkes-Barre Veterans Hospital. I was in severe pain—

* * *

[4-46]

* * *

BY MR. KUBY:

Q Mr. Kubrick, the last document that you testified to was a statement that you sent to the Government, dated September 25, 1969, which we had marked as P-6.

Now, did you after that date receive a decision from the Veterans Administration dated September 26, 1969, which we have marked P-13 and which is entitled Statement of the Case in the Appeal of William A. Kubrick from the decision of the Veterans Administration. And I show you—

THE COURT: What was that marked before, Mr. Kuby?

MR. KUBY: That is marked P-13.

THE COURT: What was it before?

MR. KUBY: It is No. 9.

A Yes, I received this letter.

BY MR. KUBY:

Q Mr. Kubrick, did you read it?

A Yes, I did.

Q What did you understand that to mean?

A To me it meant that the drug neomycin could not have [4-47] caused my hearing loss.

Q Mr. Kubrick, I refer to Page 4 of that document, the last sentence in the top paragraph starting "They found." Would you read that to yourself.

A Yes.

Q Did you read that in 1969 when you got that paper?

A Yes, I did.

Q What did that mean to you?

A That there was no malpractice, negligence or any other thing.

Q Had you at that time given any consideration or thought to malpractice, negligence, anything like that?

A No, I did not.

Q You said you knew what it meant or you had some knowledge of what the term might mean?

A Yes.

Q So when you received this document did that sentence mean anything to you in regards to your case?

A I didn't get that.

Q When you received that document in 1969, September of 1969 and when you read it, did that sentence have any meaning to you in connection with your case?

A No.

Q I refer you to the last sentence on Page 6 starting "No carelessness, accident". Read that to yourself.

[4-48] Did you read that in 1969 when you got that document?

A Yes, I did.

Q Did that sentence have any meaning to you?

A No.

Q What was in your mind concerning your hearing loss at that time in September of 1969 when you received that document, what did that whole document mean to you?

A The whole document meant to me that they just could not have caused my hearing loss.

Q The next document is Government's No. 10, our number P-14.

Mr. Kubrick, I show you a document marked P-14 from the Veterans Administration Center, Wissahickon Avenue and Manheim Street, Philadelphia, dated September 29, 1969 addressed to you. Did you receive that letter?

THE COURT: That's the letter from R. J. McCauley, Adjudication officer?

MR. KUBY: Yes, sir.

A Yes, I did.

BY MR. KUBY:

Q What did that letter mean to you?

A That meant to me that I had to fill out a statement of disagreement. As they state down in the next to last paragraph that the important things are to say in your own words what benefit you want, what facts and the statement you disagree with, [4-49] and any error you believe we made in applying the law.

Q The next document is Government's Exhibit No. 13, marked as Plaintiff's 15.

Mr. Kubrick, I show you this paper marked P-15. It is a letter from you to the Veterans Administration to Mr. McCaulay. Is that letter in reply to the other letter?

A Yes, it is.

MR. KUBY: We will speed this up, if Your Honor please.

BY MR. KUBY:

Q P-16 is Government's No. 14 and it is a letter which the Government answered your letter and said you had more time to file your appeal; is that correct?

A Yes, it is.

Q Now that last letter was dated November 10, 1969.

A Yes.

Q Now, did you thereafter write to your State Senators, the Senators of Pennsylvania, Senator Schweiker and Senator Scott concerning your problem?

A Yes, I did.

MR. HOLL: Objection, Your Honor. First of all, the question is leading; and, secondly, Senators Schweiker and Scott are United States Senators.

MR. KUBY: I will accept that if I was unclear.

BY MR. KUBY:

[4-50] Q Government's No. 15, our number P-17, I show you that document, a copy of a letter to Senator Schweiker. Would you look at that, Mr. Kubrick. Look at the second page, sir. Is that your signature?

A Yes, it is.

Q Who typed the letter?

A My wife typed the letter.

Q Did you read the letter before she typed it?

A Yes, I did.

Q Now would you in your own words explain to His Honor what you mean by sending the letter? What did you intend to accomplish by sending the letter?

A Trying to get help from them to talk to the Veterans Administration which caused my nerve deafness which I believe was caused by the drug neomycin and I wanted to get a fair decision from them.

Q Specifically, Mr. Kubrick, I refer you to the paragraph on the second page "To sum it all up". Would you read that aloud.

A To sum it all up I have spent a fortune on medical help, drugs, transportation, hotel bills and loss of work all at my own expense and now even face losing my job because I am a hazard being deaf, with a bad back and legs. All this through no fault of my own.

Q What did you mean by that?

A Well, by that I meant that it was no fault of my own because [4-51] the drug neomycin had caused my hearing loss.

Q Did you in your mind believe at that time or had any suspicion at that time concerning the item of malpractice or negligence or carelessness?

A No.

Q In December of 1969, Mr. Kubrick, when you wrote that letter had you discussed the issue of malpractice or negligence or carelessness by the doctors in the VA hospital with any lawyer?

A No.

Q With any doctor?

A No.

Q Had that fact ever come across your mind at that time?

A No, it did not.

Q Did any doctor or lawyer ever discuss it with you, the issue of malpractice at that time?

A No, not at that time, no.

Q Mr. Kubrick, I refer you to the next to the last paragraph in that letter which says "With all these facts." Would you read that aloud and tell the Court what you meant by that.

A With all these facts, and still being turned down by the VA Administration who maintain their hospitals are not capable of error or misjudgment you can see now why I desperately seek your help when applying for financial assistance.

Q What did you mean by that?

A By their decision that the drug neomycin could not cause [4-52] my hearing loss.

Q Did you mean that in any context or with any relationship to malpractice or negligence?

A No, I did not.

Q Did anyone at the VA ever, up to that time, discuss the issue of malpractice or negligence with you?

A No.

Q Were you ever told what to do if you thought there was malpractice or negligence?

A No.

Q The next document is not in the packet of Government documents. It is marked P-18. It is a similar letter addressed to the Honorable Hugh Scott.

THE COURT: Is that the same? Do you stipulate the testimony would be the same about Senator Scott?

MR. HOLL: The Government has seen that letter and we stipulate the testimony would be essentially the same.

BY MR. KUBY:

Q Now, did you get any replies from these two United States Senators?

A Yes, we did.

Q What were the replies?

A That the drug neomycin could not have caused my hearing loss because the Veterans informed them that it couldn't and that is what they wrote me back.

[4-53] Q Now in the end of 1969 were you still trying to prove what caused your hearing loss?

A Yes, I was.

Q Did you or your wife on your behalf write to the Department of Health, Education and Welfare?

A Yes, my wife did.

Q The next document is Government 16, Plaintiff's Exhibit 19.

MR. KUBY: Can we stipulate that this is a reply from the Department of Health, Education and Welfare?

MR. HOLL: Certainly.

MR. KUBY: Dated December 30, 1969.

I think we can stipulate concerning Government Document No. 18, which we have labeled as Plaintiff's Exhibit 20, is another document to show the attempt by the Kubricks to establish a cause and effect relationship between the drug and the hearing loss. This is a letter from Dr. Schuknecht of the Massachusetts Eye and Ear Infirmary in Boston affiliated with the Harvard Medical School directed to Mr. Kubrick. Is that correct, Mr. Holl, can we so stipulate?

MR. HOLL: Yes.

BY MR. KUBY:

Q Mr. Kubrick, the document marked 18, was that received by you in reply to a letter sent to this doctor in Massachusetts?

A Yes, it was.

[4-54] Q Now, why did you write to him?

A To try to find out if the drug neomycin could have caused my hearing loss.

BY THE COURT:

Q Mr. Kubrick, when did you first discuss with Dr. Sataloff this problem?

A About my hearing loss?

Q Yes.

A I believe it was in October or November of '68.

Q Now, what, as you best recall, best can recall, did Dr. Sataloff tell you?

A Dr. Sataloff at that time didn't tell me anything that caused my hearing loss until he got the records from the Veterans Administration.

Q And then what did he say?

A He said there was a possibility that is what caused my hearing loss.

Q Did he tell you what his opinion was that it did or that it didn't or did he simply use the word possibility?

A He used possibility all along.

Q Did Dr. Sataloff ever say anything to you back in '68 or '69 about whether they should have treated you with neomycin?

A No, he never did.

Q Did he ever express an opinion to you as to whether they gave you the proper dosage of neomycin or did not give you the [4-55] proper dosage of neomycin?

A No, he did not.

Q Did he ever express an opinion to you as to whether the doctors at the Wilkes-Barre Veterans Administration Hospital treated you properly or did not treat you properly?

A No, he did not.

Q Did you ever ask him about those questions?

A We only asked him if the drug neomycin could have caused my hearing loss. He said it was a possibility. And that's all they ever told me.

THE COURT: Go ahead, Mr. Kuby.

BY MR. KUBY:

Q The next document, sir, is Government's No. 17, Plaintiff's No. 21.

Mr. Kubrick, I show you this document marked P-21 and ask you whether or not that is the form of appeal that was filed to the Veterans Administration from the denial of your claim for hearing loss?

A Yes, it is.

BY THE COURT:

Q When you were filing these claims with the Veterans Administration, and I am referring you now to '69 and we have been talking mostly about 1969 when Mr. Dudish was writing letters and when you were writing letters to Senator Schweiker and Senator Scott, and so on, did you believe that the Veterans [4-56] Administration Hospital doctors had treated your case improperly?

A No, I did not. I didn't ask anybody or have it in my mind at all.

Q Was it your belief that if the drug neomycin in fact caused your hearing loss that the Veterans Administration or the Government was liable to you whether or not somebody was at fault in their treatment of you or didn't you think about that?

A I didn't get all that off you, Judge.

Q You filed these claims and appeals?

A Yes.

Q Because you suspected that the drug neomycin was responsible for your hearing loss; is that correct?

A That the drug neomycin, yes.

Q Now assuming that the drug neomycin had caused your hearing loss, what was the basis on which you believed back in 1969 that the Government was liable to you or that the Veterans Administration was liable to you?

A Well, at that time just like when I was in the service and I got hurt it wasn't my fault and it wasn't the Government's fault but I did get compensation for my back condition and I assume it was the same condition now. It wasn't their fault and it wasn't my fault. And I was entitled to it because I lost my hearing because of the drug neomycin.

THE COURT: Very well.

[4-57] BY MR. KUBY:

Q Mr. Kubrick, in this appeal which runs for six pages, who typed it?

A My wife did.

Q Did you read it?

A I glanced through it.

Q Did you sign it?

A Yes, I did.

Q Is there anything in this appeal form of six pages which is signed by you in which you express any thought of negligence or carelessness or malpractice against the Government?

A No.

Q But what was your dispute with the Government in your mind at that time?

A That I was saying that the drug neomycin could have caused my hearing loss and they said it could not have caused my hearing loss and I didn't know for sure whether it really did.

Q And that for the record was filed December 29, 1969?

A Yes.

Q The next document is Government's 19, Plaintiff's 22.

This is a document received from the Veterans Administration from Mr. McCauley, dated February 16, acknowledging receipt of that appeal form; isn't that correct?

A Yes.

Q And the next document after that is Government's 26, [4-58] Plaintiff's 23, notifying you of a hearing date; isn't that correct?

A Yes, that's correct.

THE COURT: Mr. Kuby, don't all these documents speak for themselves? Why can't we just stipulate that they were filed where indicated, letters where written where indicated, acknowledged where indicated.

MR. KUBY: Then the next document hopefully—

THE COURT: There is no objection to the introduction of any of these, is there, Mr. Holl?

MR. HOLL: No, Your Honor.

MR. KUBY: The next document is Government's 27, Plaintiff's 24, a letter dated September 10, 1970 from a Mr. James W. Stancil of the Board of Veterans Appeal to the Mr. Kubrick advising him of the decision in his case on the appeal. And the document attached to that was Government's 28, Plaintiff's 25, which was a copy of the opinion rejecting the appeal.

BY MR. KUBY:

Q Now as of that date, Mr. Kubrick, September 10, 1970, when your appeal was denied, did you have any change of opinion or change of knowledge concerning the issues that the judge had asked you about and I

have asked you about as to whether or not there was any feeling of malpractice or negligence or carelessness in what the doctors did for you at the hospital.

MR. HOLL: Objected to as leading, Your Honor.

[4-59] A No, I didn't have any cause.

THE COURT: Overruled.

MR. KUBY: I would next mark for identification Government's 29, Plaintiff's 26, which is the transcript of the hearing before the Board of Veterans Appeals.

* * *

[4-60] MR. KUBY: I would offer to introduce and move into evidence the following additional documents.

Government's 31, which I will label as Plaintiff's 27. That is a letter from the Veterans Administration dated October 5, 1970 directed to Mr. Kubrick.

The next document is a letter from the Veterans Administration to Mr. Kubrick, No. 32, Plaintiff's 28, dated October 8, 1970.

The next letter, Government's 35, Plaintiff's 29, [4-61] a letter addressed by Mr. Kubrick to Mr. Johnson, Director of VA affairs, dated October 15, 1970.

BY MR. KUBY:

Q Mr. Kubrick, in connection with that letter it is stated at the top of the third paragraph:

"Mr. Johnson, if I sound like too much of a Pessimist as to your text in your letter hinted to, Please keep in mind I already have gone through much, when I lost my Hearing as the result of a Medical Error, whether or not the Veterans Administration cares to recognize the truth even after being presented with evidence from the most competent sources."

What did you mean by that?

A Well, when we was at the hearing in July of '70 I told the Board I believe my hearing loss was caused by neomycin. And they made the decision that it could not have caused my hearing loss.

THE COURT: Ask him what he meant by the term medical error.

MR. KUBY: I think he is explaining that.

BY MR. KUBY:

Q The judge wants to know what did you mean by the term medical error in that context.

A In that letter we meant that when the Board of Physicians made a decision that the drug could not have caused my hearing [4-62] loss, that is what I call a medical error because the Board members said it couldn't happen.

Q Did you mean anything by that concerning any carelessness, any negligence, any malpractice done to you in April of 1969 at the Veterans Hospital?

A No.

THE COURT: We don't have the letter to Mr. Agnew. He wrote to the vice president somewhere along the line.

MR. KUBY: Apparently we don't have that, sir.

MR. HOLL: I suppose I have that somewhere, Your Honor.

THE COURT: It is certainly of no probative value if it doesn't say anything different from the other letters to Senator Scott, et cetera.

MR. KUBY: The next document is Government's 36, Plaintiff's 30, a letter from Mr. Kubrick to James Stancil, Board of Veterans Appeal, dated October 21, 1970.

The next document is Government's 37, Plaintiff's 31, dated October 27, 1970 from Mr. Kubrick to Mr. Clayman of the Veterans Administration here in Philadelphia.

THE COURT: Let me see counsel at side bar.

(Discussion off the record.)

(Luncheon recess taken at 12:15 P.M. until 1:45 P.M.)

[4-63] AFTERNOON SESSION

WILLIAM KUBRICK, resumed.

THE COURT: Go ahead, Mr. Kuby.

MR. KUBY: If Your Honor please, counsel for the plaintiff and for the Government have agreed to the

stipulated entry into the record of a number of documents which have been marked P-27 to P-51 inclusive. Would Your Honor wish a listing of those with the comparative other numbers or would that be sufficient?

THE COURT: I will read them.

MR. KUBY: Now I would like to make reference to some of them in examination.

I make a reference to P-29, which is the Government's 35. I think it may have been previously identified. It is the letter to Donald Johnson, Administrator of VA Affairs, dated October 15, 1970.

DIRECT EXAMINATION (CONTINUED)

BY MR. KUBY:

Q I would ask you, Mr. Kubrick, to explain what you meant by the middle paragraph on Page 2. You can read it out loud.

A According to recent news media I see I am not alone with my problems or opinions and I am aware of your opinion as given to top agency officials that conditions and criticisms of VA medical facilities are exaggerated and unwarranted especially those presented by Life Magazine. All I care to say in the matter, I suffered the consequences of an error, told the truth, [4-64] produced sufficient reputable evidence and then suffer further because someone does not feel they can admit the truth of making a mistake.

Q What did you mean by that? Would you explain to His Honor what you meant by that?

A By that I mean the Board of Physicians had made an error in the decision of the drug and the suffering I was going through was that my hearing, the ringing in my ears was driving me halfway out of my mind. And consequently I was afraid of losing my job. I wanted to try to keep it.

Q You a number of times used the term in this document and in previous documents of the phrase medical error.

Now when you used that term what did you mean?

A I meant that the Board of Physicians had made the decision that the drug neomycin could not have caused my hearing loss. That is the only thing I meant in them letters.

Q Did you mean anything concerning carelessness or negligence or malpractice in the giving of the drug to you in the first place or in the amount of drug that was given?

A No, I did not.

Q Did you have any inkling at that time that there was something wrong in the way the drug was given to you or in the amount of the drug being given to you?

A No.

Q Now the last sentence in the third paragraph starting [4-65] "Perhaps". Would you read that into the record, please.

A Perhaps you recommend me to a hospital or doctors capable of correcting this error.

Q Again, what did you mean by that term "error"?

A I meant that term error sending me to all different places to get information and try to find a hospital or a doctor that would say the hearing was caused by neomycin, to sort of try to convince the Veterans Administration that it was possible.

Q Just read the last sentence again.

A Perhaps you recommend me to a hospital or doctor capable of correcting this error.

Q Did the Government ever reply to that last request?

A No, they did not.

Q I refer to plaintiff's exhibit 31, which is Government's 37.

I would like you just to read for the record the five small paragraphs which are on the second page which I think are important in establishing your frame of mind.

A I do believe your office will be receiving further evidence of the fact that, I had normal good hearing before this drug had been administered, without using proper precautions. I would appreciate this new evidence being placed on file along with other evidence.

I cannot see the benefit of time delays. The truth is the truth now, tomorrow and thereafter. I believe [4-66]

I have been most patient, especially considering what I have lost, and it is I and my family that have been doing the paying, healthwise and financial.

I have been patient because I am an American and served my country to preserve freedom and to insure liberty and justice for all. I am aware of the problems facing our great land, though I have suffered much, preferred being tolerant rather than give undesirables more reason for creating disturbances and fault finding. It is now this justice I seek one way or another.

Though I have lost much I have gained something, wisdom. God help a needy veteran, who looks to others to assist him, may he look after his own affairs and God bless him if he cannot.

I have discussed my feelings and the facts, truthfully and frankly, I am confident you will accept such in good faith and understanding. If you have any further questions or desire additional proof or feel a personal visit might clarify matters, I will be in Philadelphia on November 19, and would be most happy to discuss matters. Please advise.

Q What did you mean by all of that?

THE COURT: By all of that? Ask him what he meant by saying that he had good normal hearing before this drug had been administered without using proper precaution.

[4-67] BY MR. KUBY:

Q Now what did you mean I had good normal hearing?

A I had good normal hearing before the drug had been administered without using proper precautions. Good hearing would prove we sent for records to the people that had the records in the Army Depot about my hearing. And that proved I had good hearing.

Q What did you mean by the term without using proper precautions?

A I referred that the drug could have caused my hearing loss. That's all.

Q Is that what you meant by that phrase?

A Yes.

BY THE COURT:

Q What did you mean by proper precautions? You said that the drug was administered without using proper precautions. What did you mean by that?

A I don't know.

Q Who composed this letter?

A My wife did. She composed all of my letters.

THE COURT: Go ahead.

BY MR. KUBY:

Q Now, Mr. Kubrick, did there come a time in 1971 that you spoke to Dr. Soma about your situation?

A Yes, there was.

[6-68] Q What was the situation or what was the circumstance of your seeing Dr. Soma in 1971?

A I went to see Dr. Soma after we got a statement from the Government that Dr. Soma said that my hearing loss was the fault of an acoustic trauma and we went to see Dr. Soma to ask him if he said that.

Q When in 1971 was that?

A In June, 1971.

Q Did you have any conversation with Dr. Soma at that time?

A Yes, we did.

Q What did Dr. Soma tell you, if anything, concerning your condition?

A He told me that the drug neomycin caused my hearing loss.

Q What, if anything, did he tell you concerning the action of the doctors at the Veterans Administration Hospital in Wilkes-Barre concerning the giving of neomycin to you?

A He said that they shouldn't have given it to me.

Q Was that the first time that any doctor—

THE COURT: A leading question, Mr. Kuby.

BY MR. KUBY:

Q Had you ever been told that before?

A No.

Q By anybody?

A No.

Q What did you do after that?

[4-69] A We left and my wife composed a letter and we sent it to the Veterans Administration.

Q I show you a letter—this is not within the Government's catalog of documents, sir, for some reason—marked P-39. I ask you, Mr. Kubrick, is this five-page letter the letter that you have indicated was sent to the Government after your meeting with Dr. Soma?

A Yes, it is.

Q Did you have an opinion at that time or did you have a feeling at that time concerning whether or not the Government had committed negligence or carelessness upon you?

A Dr. Soma said that they shouldn't have given me the drug. So I figured they shouldn't have given me the drug.

Q Had you ever had that feeling before?

A No.

Q And why had you not had that feeling before?

MR. HOLL: Objection, Your Honor.

THE COURT: Overruled.

BY MR. KUBY:

Q Why had you not had that feeling about the Government before?

A Because I never knew that the drug really did it for a fact.

Q Well, Dr. Soma told you more than just that the Government did it?

[4-70] A Oh, yes. He showed us in his text he had. I believe it was the PDR, he let us read it in his office and after reading that and after what he told us we figured that it wasn't what the Government had been saying all along.

Q I show you Page 4 and ask you to read the first paragraph.

A Documentary instruction, taken from medical reference text, clearly gave instruction for the proper usage, precautions and procedures to employ as precautionary measures to be followed in the use of the drug neomycin, this included an audio test given before, during, and after the use of neomycin. If this is done the damage would

have been detected in the early stage and drug discontinued before damage became extensive. This procedure was not followed, thus there is evidence of carelessness, lack of medical knowledge, negligence, error in judgment and malpractice, on the part of the staff at the Wilkes-Barre Veterans Administration Hospital.

THE COURT: What was that he was reading from?

MR. KUBY: That is the letter he sent to the Veterans Administration dated July 14, 1971.

THE COURT: Is this an exhibit, one of the Government's exhibits?

MR. KUBY: No, sir. For some reason they didn't put it in.

THE COURT: What number is this now?

[4-71] MR. KUBY: P-39.

THE COURT: What is the date of that?

MR. KUBY: July 14, 1971.

BY MR. KUBY:

Q Now I refer you to page 5, Mr. Kubrick, under Summary of Proof No. 6. Would you read that.

A Proof, that the veteran received this drug improperly, at the VA Hospital. Proper precautions ignored.

Q Mr. Kubrick, did you see Dr. Sataloff in the summer of 1971?

A Yes, I did.

Q Was that after you saw Dr. Soma and had the conversation with Dr. Soma that you have just related?

A Yes, it was.

Q Did Dr. Sataloff discuss with you the use of the drug neomycin?

A No, he did not. I mentioned to him what Dr. Soma said but he didn't discuss the drug.

Q Did he discuss with you anything concerning the treatment that you had gotten at the Veterans Hospital?

A At that time, no.

Q Did you subsequently retain a lawyer?

A Yes, I did.

Q How did you get to a lawyer?

A Well, when I was in Dr. Sataloff's office and I told him [4-72] what Dr. Soma said, he said we better see a

lawyer. And then he asked if we had a lawyer. And we told him no. And we asked him if he could possibly know of a good one. And then he mentioned Attorney Sagot to go and see.

Q Did he tell you why he was suggesting that you see a lawyer?

A No. He just told me I better get a lawyer.

Q What did you understand, Mr. Kubrick, from his suggestion that you go see a lawyer?

A At that time I just didn't know what he had meant exactly by it. But he must have had something in his mind.

Q Did you go to see Mr. Sagot?

A I went to see Mr. Sagot but I didn't see him at all because his assistant attorney Anapol was handling the case for him.

THE COURT: Would you establish the date he went to see Sataloff and Sagot or Anapol?

BY MR. KUBY:

Q Can you be specific to the best of your recollection, Mr. Kubrick, as to when you saw Dr. Sataloff in 1971 on the occasion he suggested a lawyer?

A I believe that was in July.

Q Was that before or after you saw Dr. Soma?

A That was after I saw Dr. Soma.

Q Can you be specific as to the first time that you saw the lawyer, Mr. Anapol?

[4-73] A The first time I seen the lawyer was July 10th, I believe it was. Somewhere around there.

Q I am referring to Government Document 49, which is Plaintiff's 38.

Mr. Kubrick, I show you a letter dated July 31, 1971, from you to the Veterans Administration.

A This is the letter that Attorney Anapol told me to send to take power of attorney from the VFW who had power of attorney for me.

Q I refer to Government Document 50, which is Plaintiff's Exhibit 40. Did you write another letter dated August 30, 1972 advising the Veterans Administration that you retained Mr. Anapol?

A Yes.

THE COURT: Does that cover that phase? Why don't you finish a phase and, I take it, this gentleman is Dr. Benner. You might as well put him on.

BY MR. KUBY:

Q Just in conclusion, Mr. Kubrick, at any time before you spoke to Dr. Soma in the summer of 1971 did you have any inkling, any feeling or any opinion on your own or whether or not it was received from anybody else that the Government through its doctors in the Veterans Hospital had been careless or negligent or guilty of malpractice in giving you the neomycin?

A No.

BY THE COURT:

[4-74] Q On that subject. You had seen Dr. Soma before the summer of '71 hadn't you?

A He gave me a hearing test in '68.

Q And had you seen him between?

A No.

Q Well, how did Dr. Soma come to give you the opinion that he did? Did you have him review records or did you just go to him again in the summer of '71 or was there some advance notice to him that you were coming and did he search out certain records?

A We got from the Government a statement telling me that Dr. Soma told the VA man there that my hearing loss was acoustic tremor. So we took that letter in June to show Dr. Soma is what he meant. And then at that time was the first time I told him I did receive neomycin.

He told me he never told the Veterans Administration man what they said in the letters that he wrote. That they really was like gestapo agents. They tried to put tape recorders on his desk and everything else.

So we went to see him and that is when he told me about they should not have used it.

BY MR. KUBY:

Q Government Document 47, which is Plaintiff's Exhibit 36.

Mr. Kubrick, I show you an exhibit marked P-36. It is a letter from Dr. Joseph Soma to the Veterans Adminis-

tration, [4-75] Mr. Tallen, dated June 8, 1971. Was a copy of this letter sent to you?

A Yes, there was.

Q Do you know if this letter was sent before or after you met with Dr. Soma in 1971 and had the conversation that you told Judge Becker about.

A It was sent before then.

Q This letter that was sent by Dr. Soma to Mr. Tallen of the Veterans Administration was sent, if you know, before or after your meeting with Dr. Soma?

A It couldn't have been sent before the meeting with Dr. Soma because he seen us about a week before that.

* * *

[4-106] BY MR. KUBY:

Q Mr. Kubrick, I would like to go back to these letters [4-107] that were written around October of 1970 and to have you clarify certain things for me.

Specifically I direct your attention to P-29, which is Government's 35.

The first page and I would ask you to—well, we will make it fast.

You just read the first sentence starting "Mr. Johnson".

A Mr. Johnson if I sound like too much of a pessimist as your text in your letter hinted to please keep in mind I already have gone through much when I lost my hearing as the result of a medical error, whether or not the Veterans Administration cares to recognize the truth even after being presented with evidence from the most competent sources. When offered this evidence the original reason for denial was dropped and a new idea was introduced by the Board members, that of the possibility of having a hearing problem prior to the hospital stay of April 1968. Upon hearing this new theory I spontaneously offered sources where information could be obtained to disprove this new theory. I did sign papers authorizing them to do so. I have sent for my own copies of this information to Tobyhanna Army Depot where I had been employed prior to this misfortune, where a routine record of audio tests given there, prove I had good hearing prior

to [4-108] this hospitalization. I sent for these papers last July when I returned from Washington, and received them within a week. I was informed by the VA District Office in Philadelphia, October 8, when I stopped in while en route to my monthly visit to Dr. Joseph Sataloff, they had just sent for this evidence that day. I can only comment two and one-half years is not much time, except for the one bearing the burden.

Q Now when you used the term "medical error" in that paragraph, what did you mean?

A That was referring to the board of physicians that was there because the only evidence I told them is the evidence contained in that ototoxic drug containing neomycin was possible to cause my hearing loss.

Q You say later on they changed their theories. What did you mean by that?

A Well, they brought up at that hearing that possibly I had lost my hearing before I entered the hospital. And that is the theory I was trying to disprove. So that is why we had them reroute it back to Philadelphia to get all of the medical records and the previous employment. That they can be proven I did not have this hearing loss before.

Q Now that was October 15, 1970. Then the next document is P-30, which is Government's 36. Six days later you sent another letter to the Veterans Administration to Mr. Stancil. [4-109] That speaks for itself. I am asking you in between this letter of October 15 and the letter of October 21, 1970, did you review this case with any doctor or lawyer who might give you any further information?

A No.

Q So you were acting on the same information you had before?

A Yes.

Q Now that letter of October 21 is in reply to a letter from the Board of Veterans Appeals which we have marked as P-30-A. It is not included in the Government's packet. Would you read that letter which you received. It is from James Stancil. It is from the Board of Veterans Appeals and dated October 19, 1970.

A I noticed from your recent letter to the vice president that you expressed a belief that your defective hearing had resulted from medication administered to you while hospitalized for your back condition at the Wilkes-Barre Veterans Administration Hospital in April, 1968. This raises an issue that was not before the Board when your appeal was considered in September.

Accordingly, I have contacted the Veterans Administration Center, Philadelphia and have asked that facility to obtain the complete record of your period of hospitalization in 1968 for the purpose of determining whether you are entitled to disability compensation for the hearing loss under the provisions of 38 United States [4-110] Code 351.

The Philadelphia Center will notify you of the results of the adjudication on this issue. You will also be advised of your appeal rights if the decision is not favorable to you.

THE COURT: What number is that?

MR. KUBY: It is Plaintiff's Exhibit 30-A.

BY MR. KUBY:

Q Now your reply was dated October 21, 1970.

By the way, this letter of October 19, did that say anything about filing a Form 95?

A No, it did not.

Q Had you ever heard of a Form 95?

A No, I did not.

Q Had anyone from the Veterans Administration ever told you about a Form 95?

A No.

Q Now your reply to that letter as I indicated was October 21, 1970. Now six days later you sent this letter to Mr. Clayman at the Veterans Administration in Philadelphia. You testified about that before. That is P-31, it is Government 37.

A This letter here I did not read. I think I answered in a deposition that I had but I did not read this letter.

THE COURT: Which letter is this?

MR. KUBY: P-31.

[4-111] THE COURT: Who signed the letter?

BY MR. KUBY:

Q It is signed by you, is it not?

A Yes.

Q You say you didn't read it?

A No.

Q I ask you whether or not between the time you sent the letter six days before, October 21, 1970, and the date you sent—or this letter was typed October 27, 1970. If you had conferred with any doctor or lawyer or any person that gave you any information concerning whether or not what was done for you in the hospital by any of the VA doctors was wrong, was careless, was done because of malpractice?

A No.

Q Now that particular paragraph that His Honor questioned you about where it says—and I'll read it. It says:

I do believe your office will be receiving further evidence of the fact that, I had normal good hearing before this drug had been administered, without using proper precautions. I would appreciate this new evidence being placed on file along with other evidence.

Now down at the bottom there is a P.S. and it states:

The new evidence I refer to above, are sworn testimonies from reputable persons, who know and are willing [4-112] to testify to the facts.

That is what it says. Did I read it correctly?

A Yes.

Q Now I would refer to document Government's Exhibit—

THE COURT: It is his testimony that the letter which says proper precautions he never read?

MR. KUBY: That's right.

BY MR. KUBY:

Q You signed that letter?

A Yes, I did.

THE COURT: Do you have how far he went in school and how far his wife went in school?

MR. KUBY: Yes, he went to the twelfth grade, I believe.

MR. KUBY: I would make reference to the Court to Government Document 45 and Plaintiff's Exhibit 35 and the notation on Page 3 of documents apparently received by the United States Government. And I would make note of the date of October 29, 1970 and certain statements that were received apparently by the Government which were, I submit, the new evidence referred to in the prior—

THE COURT: Mr. Kuby, you can't testify. I will strike that from the record.

BY MR. KUBY:

Q Do you know, Mr. Kubrick, when the new evidence was that [4-113] was submitted with this letter of October 27, 1970?

A This new evidence as far as I can remember, because I didn't read the letter, was different people that sent letters in stating that my hearing—

Q Was one of them J. Fred Parkin?

A Yes, a minister.

Q Was another one William F. Demming?

A Yes.

Q Who is he?

A He was in the Tall Cedars.

Q What is the Tall Cedars?

A It is a fraternity.

Q Did these men ever talk to you or give you any information as to whether or not what was done for you in the hospital was careless or negligent?

A No.

Q When you went to see your first counsel, Mr. Anapol, did you turn over to him all of the documents which you had had up to that time?

A Yes, I did.

Q Did that include the letters sent by you, copies of letters sent by you?

A We took the originals to him and he made copies.

Q Did that include copies of letters that were received from the Government?

[4-114] A Yes.

Q And copies of decisions up to that time?

A Yes.

Q Did Mr. Anapol continue with the administration appeal?

A Yes.

Q To a point that in July 16, 1975, the administrative appeal with the Board of Veterans Appeals was changed and you were awarded a service connected—

THE COURT: Can't we agree on what he got?

MR. KUBY: They don't use the language. The conclusion of law is the prior decision of the Board of Veterans Appeals in August of 1972 involved obvious error of fact in denying compensation under the provisions of Title 38, Section 351, United States Code for defective hearing.

BY MR. KUBY:

Q And that was obtained for you?

A Yes.

Q Up until the time you retained counsel in the summer of 1971 were you advised at any time by anyone in the Veterans Administration offices that you went to or people that you spoke to about the necessity of filing a Form 95?

A No.

Q In any of the documents which were received by you and read by you which stated anything concerning negligence or carelessness or malpractice, was there any inclusion in any of [4-115] those letters of any Form 95 for you to fill out?

A No.

Q Did you after you retained Mr. Anapol as your lawyer have occasion to go to any Government facility to secure a Form 95?

A Yes, he mentioned to us to see if we could get one.

Q When was that?

A In the fall of 1972 I believe it was.

Q Did you go to try to get one?

A Yes, I did.

Q Where did you go?

A I went to a VA contact man in Allentown and asked him if there were any forms that you could file against the Government for malpractice.

Q What did he reply?

A He said he knew of no forms.

Q Did he give you anything in writing?

A Yes, he did.

Q I show you a document which is marked P-50, which is Government's 64, and is that a copy of the document that you received from the Veterans' employee in 1972?

A Yes, it is.

Q Did you ask him at that time specifically for a Form 95?

A We mentioned a Form 95—

THE COURT: Mr. Kuby, try to ask non-leading [4-116] questions.

BY MR. KUBY:

Q What did you ask him for?

A A Form 95 which you file for malpractice like Attorney Anapol told us to look for.

Q Mr. Kubrick, after you went to the hospital in April of 1968 and had the operation did you return to work for RCA?

A Yes, I did.

Q How long did you work for RCA after that?

A Until January of 1970.

Q Can you tell His Honor how you were able to work as long as you did with your hearing problem?

A Well, I worked on the third shift and they wasn't the full capacity of people that was on the day shift and the second shift. That the fellow workers they covered up so I could keep my job. They kept it away from the foremen.

Q In connection with your job was it necessary for you to be able to hear?

A Yes.

Q Why did you finally stop your work?

A Well, in January of 1970 the VA said they wanted to put me into the hospital to re-X-ray my leg. So when they sent me in to re-X-ray my leg they said there was nothing wrong with it. So they kept me in the rest of the month and they checked my back and gave me physical therapy.

* * *

[4-124] Q Do you have any social life with your wife now?

A No.

Q Why not?

A I just don't feel like going to them.

Q Do you eat with the family now?

A No. I sort of let them eat first and then I go and eat by myself.

Q Why?

A I want to be alone, I guess.

Q Did you ever do that before your hearing was lost?

A No, we used to always eat together.

Q Do you stay by yourself a lot?

A Yes, I do.

Q Why?

A Because I want to be alone.

Q Do you have any reason?

A Well, I just always seem depressed and I just want to be by myself.

Q Before your loss of hearing did you stay by yourself a great deal?

A No.

Q Mr. Kubrick, when was the first time that you thought that your hearing problem was caused by any carelessness, negligence or malpractice on the part of the doctors who [4-125] treated you in the Veterans Hospital.

A In June 1971.

MR. KUBY: Cross-examine.

(Recess taken at 4:25 P.M. until 4:35 P.M.)

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. HOLL:

Q Mr. Kubrick, can you read my lips if I stand here and talk to you?

A Yes.

Q Do you have any difficulty reading my lips at this rate of speech?

A What I don't get I will tell you.

Q Isn't it true, Mr. Kubrick, that on November 15, 1968 was the first time you went to visit Dr. Sataloff?

A I went to see him I believe it was in November.

Q When you went to see Dr. Sataloff that day, did you tell him that you had been to see Dr. Cole?

A Yes, I did.

Q About what, your hearing problem?

A Yes.

Q Did you tell Dr. Sataloff that first visit that you had been to see Dr. Soma?

A Yes, I did.

Q About your hearing condition?

[4-126] A Yes.

Q Did you tell Dr. Sataloff that you had been to the Geissinger Medical Center about your hearing condition?

A Yes, because that's where Dr. Cole is.

Q Dr. Cole is at the Geissinger Medical Center?

A Yes.

Q Now, had you told Dr. Sataloff on the first visit that you had been in the hospital recently?

A Yes, I did.

Q Did you tell him you had been in the VA Hospital in Wilkes-Barre?

A Yes, I did.

Q Did you tell him that you had your right leg operated upon?

A Yes, I did.

Q Isn't it true, Mr. Kubrick, that you told Dr. Sataloff that you had received antibiotics in the hospital?

A I don't know if it was that first day or the second visit. But I told him.

Q First or second visit?

A Yes.

Q And isn't it true, Mr. Kubrick, that you told Dr. Sataloff that you had received heavy dosages of antibiotics?

A No, I did not tell him that because I had no way of knowing how much I received.

[4-127] Q Well, you did testify last week, didn't you, about how much of the fluid they had administered to you?

MR. KUBY: I would object to that, sir. When you are talking about heavy dosages, you are talking about a relative term, a medical term. He can certainly testify to a factual thing which he did.

MR. HOLL: What I'm asking him, Your Honor, is whether he used those words.

THE COURT: Objection overruled.

Objection is really sustained because I don't think that was your question. So rephrase your question.

BY MR. HOLL:

Q Did you tell Dr. Sataloff, either the first visit or the second visit, that you had received heavy dosages of antibiotics?

A No, I did not.

Q You never used those words?

A No, I did not.

Q Did you tell him after the first or second visit that you had received heavy dosages of antibiotics?

A No, I had no idea of the dosage I had until 1974, '75 when Attorney Anapol showed me the hospital records.

Q But you did tell Dr. Sataloff that you had received antibiotics at the Veterans Administration?

A Neomycin, yes.

[4-128] Q And you knew it was neomycin?

A I was told I was going to be given it, so I assumed it was neomycin.

Q You told that to Dr. Sataloff, didn't you?

THE COURT: When?

BY MR. HOLL:

Q And that was the first visit with Dr. Sataloff that you told him?

A Or the second visit.

Q When was your second visit?

A I don't know offhand when that was.

Q Well, was it in 1968?

A Yes, I believe it was.

Q Do you know whether Dr. Sataloff wrote to the Veterans Administration Hospital in Wilkes-Barre asking for some information about your hospitalization?

A Yes, he said he was going to send for the hospital records.

Q At any time that you met with Dr. Sataloff did he tell you he had received some information?

A Yes, he did.

Q From the Veterans Hospital in Wilkes-Barre?

A I don't know where the records came from but he got them.

Q About your hospitalization of April 1968?

A Yes.

Q Isn't it true that Dr. Sataloff after looking at the [4-129] records told you yes, you had received neomycin?

A Yes, he told me I received neomycin.

Q When was that?

A I believe it was in April. The beginning of April of 1969.

Q April of 1969?

A Yes.

Q Did you meet with Dr. Sataloff in January or February of 1969?

A I believe I met him in January. I have to look up the records. I am not sure.

Q Did you meet with Dr. Sataloff prior to March of 1969?

A Possibly, yes.

Q Did Dr. Sataloff tell you prior to March of 1969 that neomycin had caused your deafness?

A He never told me it caused my deafness.

Q Did he tell you anything about neomycin and your deafness prior to March of 1969?

A Not to my knowledge. I don't remember.

Q Do you remember writing to the United States Naval Hospital at Bethesda, Maryland?

A Yes.

Q When did you do that?

A My wife wrote the letter.

Q When did she do that, do you know?

[4-130] A I don't know the date.

Q Was it early in 1969?

A I would have to see the letter before I could answer that.

Q Do you remember receiving a letter from the U.S. Naval Hospital in Bethesda, Maryland?

A Yes, we did.

Q I show you what is marked No. 1, D-1. Do you recognize that letter, Mr. Kubrick?

A Yes, I do.

Q Do you remember receiving that letter?

A Yes.

Q Now, doesn't that letter say generally speaking or basically that the U.S. Naval Hospital agrees with Dr. Sataloff's opinion?

MR. KUBY: I think the letter speaks for itself.

THE COURT: Let me see it.

MR. HOLL: It is Number 1 in your packet.

THE COURT: Well, it may speak for itself but he is certainly entitled to cross-examine him on it.

BY MR. HOLL:

Q If you read the letter, Mr. Kubrick, isn't the U.S. Naval Hospital in Bethesda, Maryland, telling you that Dr. Sataloff's opinion is correct?

A Yes, Dr. Sataloff's opinion was that there was a possibility and that is what they agreed with, just a possibility.

[4-131] Q And he gave you then that opinion prior to the time you received this letter, didn't he?

A Yes, he did.

Q So, isn't it true that Dr. Sataloff probably told you about this possibility of causing your deafness by neomycin sometime in January or February or 1969?

A Well, I remember now when I said it yesterday it was two months back from when I filed my opinion. Which would take that back to February.

Q Now, Mr. Kubrick, you remember you have already discussed the claim you filed for Veterans' benefits due to your hearing condition. Do you remember talking about that?

A The initial claim?

Q Yes.

A Of April?

Q Yes.

A Yes.

Q And that claim was filed April 16, 1969; is that right?

A Yes.

Q I show you what is marked D-2. Mr. Kubrick, would you please read it for me.

A I tried to read this the last time and I cannot read this letter. I did not fill it out. Mr. Dudish filled it out and had me sign it.

Q Well, Mr. Kubrick, do you remember basically what this [4-132] letter contains?

A It is a claim for service connection for defective hearing.

Q And didn't you tell the VA that Dr. Sataloff had told you about the connection between neomycin and your deafness?

A The possibility, yes. And Dudish sent a letter from Dr. Sataloff.

Q This letter, though, Mr. Kubrick, doesn't say anything about a possibility, does it?

A I would have to see the letter.

Q You can't read it at all?

A I know I told Dudish and it should be in there. I said I signed this letter but he filled it out.

It says would you please consider a supplementary claim for a bilateral defective hearing condition as the result of medication prescribed during my pre-operative

hospitalization. In September 1968—I can't make that next word out.

Q Mr. Kubrick, can you see about in the middle of the page. Look at the middle of the page where it says "I have been receiving treatment" and read that for me.

A I have been receiving treatment by Dr. Sataloff, 721 Pine Street, Philadelphia, Pennsylvania and he is of the opinion that the cause of my condition or hearing is as a result I can't make the other words out.

Q Could that be as the result of medication?

A That could possibly be prescribed.

[4-133] Q Could the next word be prescribed?

A It could be. —as a result of my hearing condition.

Q By that claim didn't you want the VA to contact Dr. Sataloff?

A I told Dudish—he said he would have Dr. Sataloff send him a letter and get a return to see what Dr. Sataloff regarded.

Q Do you know if Mr. Dudish did that?

A Yes, he did.

Q Now this April 16, 1969 claim was the first claim you had ever filed for Veterans' benefits due to your hearing condition, wasn't it?

A Yes.

Q And you appealed from adverse decisions many times over a period of years, didn't you?

A Yes.

Q But this was the only claim that you actually filed initially, wasn't it?

A I believe it was.

Q Isn't this the claim that after all your appeals were done was finally denied in August of 1972?

A I believe it was August of 1972.

Q Isn't it true, Mr. Kubrick, that this claim of April 1969 was really based in your mind on the carelessness of the doctors involved?

A No, it was not.

Q Or were on their negligence?

[4-134] A No, it was not.

Q How about the negligence of the hospital or nurses?

A No.

Q Or malpractice?

A No. I always thought they did the right thing.

Q Well, Mr. Kubrick, that is what your complaint says in this case. The piece of paper that started this lawsuit says that.

Q Which paper is that?

MR. HOLL: No. 62, Your Honor, in the list of documents.

A I was never given this copy.

BY MR. HOLL:

Q Have you ever seen that piece of paper before?

A No, I have not.

Q Will you read the sixth paragraph?

A The plaintiff William A. Kubrick learned for the first time the injury he suffered during his hospitalization of April 2, 1968 to April 30, 1968 at the Veterans Administration Hospital, Wilkes-Barre, Pennsylvania, was the result of medical malpractice, carelessness, negligence of the physician, professional nursing staff, agents, servants, employees of the Veterans Administration. He filed a claim with the Veterans Administration on August 9, 1970. And the Veterans Administration denied the claim. Hence plaintiff's claim is untimely under the Veterans Administration [4-135] Tort Act.

I never saw this. I never signed anything like this.

Q That was signed by your former attorney, Mr. Anapol?

A Well, then I did not see it.

Q When you went to see Mr. Anapol about your case, didn't he ever tell you that he was going to file a lawsuit?

A He told me he was going to file a lawsuit. I remember I asked him how much he was going to file for but he never would tell us.

Q Didn't he talk to you about filing it?

A Filing it but he never showed it to me.

Q Well, did he ask you questions about what happened to you?

A I gave him all the papers and he was supposed to get it from the papers and all.

Q Didn't you ever tell him what happened to you?

A I told him what had happened to me, yes.

Q Didn't you ever tell him that you thought that you had been wronged by the Veterans Administration??

A No, I never told anybody that.

Q You never even told Mr. Anapol?

MR. KUBY: Your Honor, the word wronged I don't think has any meaning or significance in this context. Wronged in what way?

[4-136] MR. HOLL: I will rephrase the question.

BY MR. HOLL:

Q When you were talking to Mr. Anapol about the possibility of filing a lawsuit, didn't he tell you that he was filing a malpractice case?

A He did not say he was filing a malpractice case until after he went to see Dr. Sataloff. And I went with him.

Q And then he told you?

A Yes, after Dr. Sataloff said that it was the cause of my hearing loss.

Q Dr. Sataloff?

A Yes.

Q Not Dr. Soma?

A Dr. Soma told me in June and Dr. Sataloff told Attorney Anapol when we visited him.

Q Did you tell Mr. Anapol that you thought the Veterans Administration had been negligent?

A I told him what Dr. Soma told me. And he took his own conclusions from that.

Q Did you ever tell Mr. Anapol that when you filed your claim in April of 1969 for VA benefits for your hearing condition that you did so because you thought the VA had been negligent?

A No, I did not.

Q Do you know whether Dr. Sataloff ever rendered an opinion to Mr. Dudish at his request?

[4-137] A Yes, he did.

Q Isn't it true that that opinion was rendered in June of 1969, June 30th; do you know?

A I don't know when the letter was sent to him.

Q I show you what is marked D-2. What does Dr. Sataloff in that statement say about the cause of your hearing loss?

A He said there is only a chance of it being caused by neomycin.

Q Would you read the words he says.

A There is an excellent chance that Mr. Kubrick's present hearing loss is the result of neomycin toxicity. He gives a history of medication with this drug prior to the onset of the hearing loss. Enclosed is a copy of this audigram and there is a progressive degeneration of his hearing in the period of several months.

Q Did you believe Dr. Sataloff's opinion?

A Only that there was a change in my hearing being caused by it.

Q Did you believe there was an excellent chance when he told you that?

A He never told me that. What he put in there he never told me. He just always told me a possibility. And that's it.

Q You knew, though, what Dr. Sataloff told Mr. Dudish, didn't you?

A Yes, I know what he told Mr. Dudish.

Q Well, you knew it when he told Mr. Dudish, didn't you?

[4-138] Knew what?

Q What his opinion was.

A That it was a chance of causing my hearing loss.

Q Did you believe him when he told you he thought—

A There was possibly a chance, yes.

BY THE COURT:

Q Mr. Kubrick, you have testified that when you got the initial decision from the Veterans Administration to the effect that your hearing loss was not caused by anything that happened in the hospital that you accepted that; is that correct?

A Yes.

Q Now at the same time you are saying Dr. Sataloff had told you there was a strong possibility of that. Did you believe Dr. Sataloff and believe the Veterans Board?

A I didn't know what to believe. That is why we sent all the other letters to try to find out what did cause my hearing loss.

MR. KUBY: If Your Honor please, I don't believe that Mr. Kubrick has ever testified that he accepted the initial decision of the Veterans Administration which said there was no causal relationship.

THE COURT: Do you agree with that, Mr. Holl?

MR. HOLL: That he did not agree with the Veterans Administration?

THE COURT: Well, he has said on numerous [4-139] occasions that he didn't agree with them. I seem to recall that at some point or other he said that he accepted that decision.

MR. HOLL: I think it is obvious that he didn't by what he did later.

THE COURT: O.K. Go ahead.

MR. KUBY: I think you may be making a distinction between the causative relationship which he never accepted and their statement that there was no malpractice, negligence, carelessness, which he always accepted until June of 1971.

THE COURT: I don't know that the notion of malpractice was implicated earlier.

MR. KUBY: Except that it comes in all the documentation. The documentation is twofold. From the Government they first say there is no causation; and, secondly, they say there is no evidence of malpractice, carelessness, et cetera.

MR. HOLL: That's right, Your Honor. In every document in which a decision is rendered that language is in there.

BY MR. HOLL:

Q Mr. Kubrick, during the summer of 1969 did you go to see Mr. Dudish again?

A I don't believe I went to see him again.

Q Did you ask Dr. Sataloff to write a letter to Mr. Dudish at one point urging Mr. Dudish to help you?

[4-140] A I believe I did.

Q Isn't it true that Dr. Sataloff in fact did write a letter to Mr. Dudish on September 16 of 1969?

A I believe he did.

Q Now in that letter Dr. Sataloff tells Mr. Dudish that—

MR. HOLL: By the way, Your Honor, this is Government Document No. 7.

BY MR. HOLL:

Q That Dr. Sataloff tells Mr. Dudish there is a very excellent possibility that his hearing damage could have been due to the use of neomycin by irrigation; isn't that what that says?

MR. KUBY: I can stipulate that you read it correctly.

A Yes, he said there was an excellent possibility.

BY MR. HOLL:

Q And prior to writing that letter to Mr. Dudish when you asked Dr. Sataloff to write the letter, didn't he give you that same opinion?

A No, he did not. He never put excellent in it.

Q By the way, did Mr. Dudish, to your knowledge, follow through?

A As far as I know he did.

* * *

[5-7] Q But you had had a bad experience with a lawyer?

A Yes.

Q Well, the first lawyer that you saw in connection with this matter was Mr. Sagot.

A Yes.

Q Did you consider going to a lawyer before Dr. Sataloff told you you ought to get a lawyer?

A Was I what?

Q Did you think about or talk about getting a lawyer before Dr. Sataloff told you you ought to get a lawyer?

A No, I did not, because I had no reason to believe I needed one.

Q You thought you could take care of this yourself?

A I had nothing to say to him. What would I need a lawyer for the case? All I was asking that the drug neomycin could have caused my hearing loss and I was trying to get compensation for it.

THE COURT: O.K.

BY MR. HOLL:

Q Now the denial that you received from the VA in August of 1969 was a denial for service-connected benefits, wasn't it?

A Yes.

Q And the reason for the denial was, one, was it not, that the VA decided that the neomycin you received did not cause your [5-8] deafness; isn't that true?

A I believe that was what they said. But I would have to read the letter that you are referring to.

Q And you disagreed with that, didn't you?

A Yes.

Q And the other reason for the denial was, was it not, that there was no evidence of negligence, carelessness or fault on the part of the Government?

A Yes.

Q And you disagreed with that too, didn't you?

A That I disagreed. I didn't believe they were careless or at fault or negligent in any way.

Q But you understood what they meant by that, didn't you?

A At that time I started, yes.

Q Now, Mr. Kubrick, I want to show you the critical record, the report from the hospital that was associated with the denial of August 1969.

MR. HOLL: Your Honor, that is No. 6.

BY MR. HOLL:

Q Have you ever seen that before?

A Not until after Attorney Anapol showed it to me.

Q Now, do you know what this is?

A Do I what?

Q Do you know what that is?

A It is a clinical report.

[5-9] Q And do you know what it is about?

MR. KUBY: If Your Honor please, it seems to me this would be totally irrelevant if he did not see it until he was shown it by Mr. Anapol after he retained Mr. Anapol, which was subsequent to the summer of '71.

MR. HOLL: I just want to know if he knows what it needs, Your Honor, that is, the basis for the denial.

MR. KUBY: Well, if he didn't see it what is the relevance of it?

THE COURT: Which document is this?

MR. HOLL: No. 6.

THE COURT: What is your offer of proof?

MR. HOLL: Your Honor, this is the original board that met to determine whether or not Mr. Kubrick's claim for service-connected benefits would be allowed. And this document is the basis of the denial in August of 1969.

THE COURT: I understand.

MR. HOLL: And I'm offering it to see whether or not Mr. Kubrick understands what is said there.

MR. KUBY: But it's testified by Mr. Kubrick that he did not see it until Mr. Anapol apparently secured it and showed it to him after he retained Mr. Anapol.

THE COURT: Well, if he never saw this clinical record until after he retained Mr. Anapol, what relevance would it have? What probative value would it have?

[5-10] MR. HOLL: The fact that it is the basis of the denial. I want to know if he understands what the basis is if they state it in writing.

THE COURT: I sustain Mr. Kuby's objection. To ask this witness about the basis of a denial which he never saw or he never heard of until after the period relevant to this whole dialog, namely, the period during which under your theory the statute ran would it seems to me have no probative value. Now maybe I'm missing something, Mr. Holl.

MR. HOLL: No, I don't think so.

THE COURT: O.K. We disagree.

Objection sustained.

Unless you disagree with the factual predicate of Mr. Kuby's objection. Ask him when he first saw it.

MR. HOLL: He already testified to that.

THE COURT: Well, ask him again. If you want to pursue it. I know he has answered it once.

MR. HOLL: No, that's all right.

THE COURT: Fine. Then proceed with the next question.

BY MR. HOLL:

Q Now, Mr. Kubrick, did you ever see a statement of the case that presented the reasoning for the denial of your claim for service-connected benefits?

A I believe I did, in September.

[5-11] Q In September of 1969?

A Yes.

MR. HOLL: This is No. 9, Your Honor.

BY MR. HOLL:

Q Is that what you saw?

A I believe it is.

Q And that statement of the case said that your claim for benefits, for service connected benefits—

THE COURT: Mr. Holl, I don't want to get the record confused. You are now referring to Government Exhibit numbers on this compendium which you gave me. But these documents will go in under plaintiff exhibit numbers. And if the Court of Appeals is looking at this record some day they may get confused.

MR. KUBY: Every time I noted a—

THE COURT: Well, I know you noted both. So maybe Mr. Holl ought to do the same.

MR. KUBY: That is P-13, sir.

THE COURT: Well, why don't you just chime in.

BY MR. HOLL:

Q Now, Mr. Kubrick, isn't it true that that statement of the case as you understand it gave two reasons for denying your claim for service-connected benefits?

A I would have to read the reasons.

Q You don't remember what it says?

A No.

[5-12] Q But you did read it in September of 1969?

A Yes, I read it.

Q And is it your testimony that you understood what you read when you read it in September of 1969?

A No, I would say some parts I might not have understood.

Q Can you tell me which parts you may not have understood?

A I would have to read it.

Q Would you please read the sentence I just pointed to?

A No carelessness, accident, negligence, lack of proper skill, error in judgment or other instance of indicated fault on the part of the Veterans Administration has been shown, so that the decision denying service connection for additional disability due to hospital treatment is found correct and affirmed.

Q Do you remember reading that in September 1969?

A Yes, I did.

Q Did you understand what they meant when they said that?

A That they were not at fault.

Q You understood that?

A Yes.

Q Now, isn't it true that on December 29, 1969 you then filed an appeal to the Board of Veterans Appeals?

A Yes, I believe it was then.

MR. HOLL: This is No. 17 on the Government's list.
[5-13] MR. KUBY: P-21.

BY MR. HOLL:

Q Is that the appeal that you filed?

A Yes, it is.

Q Would you turn to the second page, please.

Now in the first paragraph of the second page, Mr. Kubrick, you talk about the procedures that were performed in the hospital when you were in the hospital in April 1968, don't you?

A Yes.

Q And at times during that paragraph you dispute what was said in the statement of the case by the VA, don't you?

A Yes.

Q Where did you get these bits of information about your hospitalization?

A May I look at it?

Q Certainly.

Mr. Kubrick, in that first paragraph of the second page of your appeal you were disagreeing with the facts in the statement of the case published by the VA, weren't you?

A Yes.

Q Where did you get these facts that you wrote in this appeal?

A Which ones are you talking about?

Q Any of the ones that you disputed.

[5-14] MR. KUBY: Well, that's a broad thing. Can you be more specific.

THE COURT: Be more specific. Which page?

MR. HOLL: Second page, first paragraph, Your Honor.

MR. KUBY: That is about 30 lines.

MR. HOLL: That paragraph contains many different disputes.

THE COURT: Which paragraph?

MR. HOLL: The first paragraph on the second page.

THE COURT: Which starts?

MR. HOLL: Admitted April 2nd, 1968. The document is No. 17 on our list. It is entitled Disagreement of Facts of the Issue.

THE COURT: O.K. I have it.

BY MR. HOLL:

Q Now that paragraph contains all kinds of disagreements of facts, doesn't it?

A Yes.

Q Where did you get the facts that you put in that paragraph?

A The one that you have underlined you want answers to?

Q Any of the facts.

MR. KUBY: Well, I think again—

THE COURT: Let's take it one by one.

[5-15] BY MR. HOLL:

Q Mr. Kubrick, you disputed the size of the cavity in your leg, didn't you?

A Yes.

Q Where did you get the idea that you should do that?

A Because they said in there, stated that it was—I'm not sure. I would have to see that statement.

Q What makes you think that is not true?

A Because of my leg.

Q You mean because of your scar?

A Yes.

Q You also said that neomycin was given to you orally as well as by the hemovac tube system?

A Well, at first Dr. Wetherbee I thought he said that I was going to get medicine through a tube and orally. And I just assumed it was neomycin I got orally at that time.

Q So that was another dispute you had with the VA statement?

A At that time.

Q And you disputed the length of time that the hemovac tube system was used, didn't you?

A Yes.

Q Where did you get the idea that you should dispute that?

A I do not know exactly how many days it was. But I knew it was longer than ten days, I assume. So we just averaged. They said ten and we said twenty.

[5-16] Q Where did you get the 20 days from?

A Just set it.

Q You just made it up?

A Yes. Made up for the simple reason for they are to tell us how many days it was really given. That's all.

Q Now you also disagreed with the VA statement that you improved and healed and didn't have any complications, didn't you?

A Yes.

Q Why did you disagree with that?

A There were complications such as the patient losing 35 pounds, is that what you are referring to?

Q Why did you dispute the fact that the wound healed and you got better?

A I am trying to find that in here.

Q It starts with the sentence "The summary states".

A The summary states casually "He improved, healed and no complications. He was discharged. Contradictory there were complications such as the patient losing 35 pounds in his 29-day stay. Patient in such severe pain had to be given morphine every four hours. Patient only sat at his bedside and in a wheelchair the last few days of his stay."

That we referred to the complications while I was in the hospital.

Q Isn't it true that you wanted to point out to the VA that [5-17] there were a lot of things done that they didn't put in their statement?

A No, I did not.

Q Then why did you make that statement then?

A Because that's what it was. That is my belief.

Q And this was in disagreement with what they said in their statement, wasn't it?

A Well, their statements referred to after I was discharged. And my statement referred to while I was in the hospital.

Q But the title of that paragraph in this page is disagreement of facts of the issue, isn't it?

A What?

Q The title on the top of the page?

A Yes.

Q Is disagreement of facts of the issue.

A Yes.

Q So you were disagreeing with the facts that the VA put in their statement, weren't you?

A If you would let me explain something.

Q Certainly.

A When we got the decision in September we went to see Mr. MacDade. And Mr. MacDade's office, his secretary told us at that time if you didn't contradict what the VA said they would take it and put it down as being true. So we contradicted what we thought we should contradict.

[5-18] THE COURT: Mr. Kubrick, turn to the next page, Page 3.

MR. HOLL: I was just about to that, Your Honor.

BY THE COURT:

Q Now you state there not a small abscess cavity, rather a 10-inch cavity. It is stated a one percent neomycin solution was used. This is questionable. However, the 10-day period mentioned is a—let me skip a bit.

And then I go down to this sentence.

"It is also untrue that the Veteran never received the drug systematically. There is also a difference of opinion in the statement about the adverse reaction mentioned on the packaged literature. It has been found, depending on quantities used to irrigate, definitely possible that hearing loss can occur and be directly caused by if enough high blood level of the drug was reached."

Now, did you write that?

A My wife wrote that.

Q Did you or your wife have any professional help in writing this from a lawyer or a doctor or anybody?

A No professional help we didn't have at the time.

Q You and your wife did this all on your own without any professional help?

A Repeat that again.

Q You and your wife wrote this all on your own without any [5-19] professional or expert help?

A No, on that part there that you are referring to, when I was working up in RCA and I went into the dispensary and I had a sty on my eye and the nurse was treating it she had a book on the table and I asked her what that book was. She told me it was a book on drugs.

I asked her if it had neomycin in it.

She said yes. And she looked it up for me and read part of the thing out of it. A Physician's Desk Reference. I did not read it. She read part of it and I went home and told my wife they said that in the book.

Q Was this while you were still working for RCA?

A Yes.

Q Did you talk to her about the problem?

A No.

Q Did you talk to her about whether they should have given you neomycin?

A No.

Q Or the effects of neomycin?

A I couldn't talk to her about anything because I was afraid of losing my job if they ever found out I was losing my hearing. She would be compelled to tell them if I told her that.

Q Now when you wrote or your wife wrote that "There is also a difference of opinion to the statement about the adverse reaction mentioned on the packaged literature" and when you further wrote [5-20] "It has been found, depending on quantities used to irrigate, definitely possible that hearing loss can occur and be directly caused by if enough high blood level of the drug was reached".

Did it occur to you maybe somebody had done something wrong or had been negligent or careless when you wrote that?

A It never entered my mind on that.

THE COURT: Go ahead, Mr. Holl.

BY MR. HOLL:

Q Mr. Kubrick, the very next paragraph starts "The board". Do you see that paragraph?

A Is it on the first page we are on?

Q Page 3. Would you read where it starts "The board"?

A The board also made the statement on this day, quote, they found no evidence of carelessness, accident, negligence, lack of proper skill, or error in judgment, or any other fault. This is a mighty broad statement, covering a lot of territory. Are we talking about men, or God. I do not think that such a statement could apply to any person on this earth. However, we do not believe that this happened due to carelessness, improper skill but would rather believe is the outcome of error in a mortal man's judgment, or accident, especially when considering the rundown state of the patient.

Q What you wrote about the board saying carelessness, negligence, that came from the statement that the VA had sent you, [5-21] didn't it?

A Yes.

Q And you knew what they meant, didn't you?

A Yes.

Q What did they mean?

A That they were not at fault and it was not careless or negligent.

THE COURT: You can't ask this man what they meant. You can ask him what he thought they meant. That is what is relevant, Mr. Holl.

BY MR. HOLL:

Q Isn't it true that you thought the VA in their statement meant that they weren't careless or negligent?

A Yes.

Q Would you explain to me, please, what you meant by the words "would rather believe this the outcome of error in a mortal man's judgment"?

A Well, when they made the decision that the drug neomycin couldn't cause my hearing loss, that is what I meant by that error. That they erred in their judgment of my decision.

Q But just before you wrote that you were talking about the board's decision about negligence, weren't you?

MR. KUBY: That's objected to as being argumentative.

THE COURT: Read the question and answer back.

[5-22] (The last question was read.)

THE COURT: Overruled.

Put the question again.

BY MR. HOLL:

Q Just before in that same paragraph you read the words "error in a mortal man's judgment". Weren't you discussing the VA Board's statement about negligence?

A No, I never thought they were negligent in their duties.

Q That is not my question, Mr. Kubrick. Just before the words appear in your letter—

A Wait a minute. This appeal or mine? Where are you referring to?

Q The words in front of you, Page 3, "Error in a mortal man's judgment". A few sentences before that, above that you were discussing the VA Board's statement about negligence, weren't you?

A I didn't mean negligence. I was just disagreeing.

Q But your comment about error in a mortal man's judgment comes right after your discussion about the board's statement on negligence, doesn't it?

A It comes after—

MR. KUBY: Objection. There are elements in that first sentence which make this question completely improper I submit, sir.

THE COURT: Objection is overruled.

[5-23] BY MR. HOLL:

Q Mr. Kubrick, would you please turn to Page 5 in the paragraph that starts "This article". Do you see that?

A Yes.

Q Do you know what that says? Don't read it but do you know what that says?

A No, I don't.

Q Then would you please read it.

A This article further states "The statement from his physician, Dr. Sataloff, who is highly trained and most capable in his field was speculative, suggestive of the possibility, not a positive finding. It is a definite fact that other prominent men in this field have shared and respected his opinion. It is further believed he would risk his reputation if he sincerely did not believe and base his report on some solid evidence on which to base his belief.

Q Isn't it true when that was written you firmly believed that Dr. Sataloff was right?

A That there was a possibility, yes.

Q And you disagreed with the VA's statement, didn't you, that the drug did not cause your deafness?

A Yes, I did.

Q Now the small paragraph that starts "It may be worthy to note". Would you read that.

A It may be worthy to note Dr. Sataloff got his information [5-24] from them and their records at the Wilkes-Barre Hospital on which to base his opinion, not from me. He merely informed me of the findings.

Q So, isn't it true that you were telling the VA in that paragraph Dr. Sataloff found from the medical records and told you that neomycin was the possible cause of your deafness?

A Was the possible cause of my deafness, yes.

Q He informed you of that?

A Yes.

Q Now, Mr. Kubrick, in the last paragraph of Page 5 a sentence starts "Now I should". Would you read that sentence?

A Now I should think not deliberate, but merely a fact of error or other undeliberate instance, this however is most unfortunate for the one who has the burden of ill-health, who also then bears the burden of an unjust decision.

Q When that sentence was written, what did you think that had to do with the VA's decision that neomycin didn't cause your deafness?

A That sentence did not refer to that. If you look at the statement of facts, that statement is from the first part concerning my back. If you look at that in the same words that were used at the top of that sentence. Concerning my back only.

Q So you are saying that was a fact of error when you made that statement, that didn't have anything to do with your hearing loss?

[5-25] A No, it did not.

BY THE COURT:

Q Back on Page 3 where you say "However, we do not believe that this happened due to carelessness, improper skills but would rather believe this the outcome of error in a mortal man's judgment, or accident, especially when considering the rundown state of the patient". It is your

testimony that when you talk about error there you are talking about the board's decision being in error?

A The board's decision that the neomycin could not cause my hearing loss.

Q That's the error you are talking about there?

A Yes.

Q And you weren't talking about the possibility of there being an error which just could have happened like things happened in life without carelessness or negligence?

A Yes.

Q You are talking about the board's decision?

A Yes.

* * *

[5-69] Q But suffering the consequences of an error also meant the board's error; is that right?

A The board's error. Because I had to lose work and didn't have the money to get along with and it was financial disaster.

Q Now, Mr. Kubrick, the very last sentence on Page 2 says "Perhaps you recommend me to a hospital or doctor capable of correcting this error". What does that mean?

A Like I said, I didn't read all of this. I have to read it now.

That the error was the loss of my hearing. And if any doctors or hospitals could possibly through surgery or anything help me. And none of them said so.

Q Mr. Kubrick, isn't it true that all along your claim for disability benefits for your hearing condition was based upon your suspicion that the hospital or the doctors on the staff had done something wrong?

A No.

Q If that is true, Mr. Kubrick, then isn't it also true that the VA would have no way of knowing that you thought about malpractice because you didn't?

A Repeat that again. I didn't get all of that.

Q Isn't it true, Mr. Kubrick, if you never believed there was negligence or carelessness the VA would have no reason to believe you thought so?

A I never believed they did.

* * *

TESTIMONY OF DR. J. SATALOFF

* * *

[5-82] BY MR. KUBY:

Q Dr. Sataloff, where did you first have occasion to examine and treat the plaintiff in this case, William Kubrick?

A 11-15-68.

Q Where was that, sir?

A In my office in Philadelphia.

Q Did you take a history from Mr. Kubrick at that time?

A Yes, sir.

Q Would you please tell us what he said to you.

A In summary he said he developed sudden bilateral ringing tinnitus during the past four months. Started roughly in July [5-83] and it was getting worse. His hearing was also deteriorating, especially during the past two months.

He indicated he was in the hospital about April or May for osteomyelitis and received heavy doses of pain killers and antibiotics. He denied having any familial deafness and said he received much gunfire about eight years ago.

He also indicated that he was tested at the Gessinger Hospital and was told that the cause of his hearing loss was a viral infection and indicated that he was also tested at the Veterans Administration Hospital and was told it was as a result of the medication that he had received.

Q Now what, if anything, did you proceed to do at that point as far as an examination of Mr. Kubrick is concerned?

BY THE COURT:

Q What was the date of this, Dr. Sataloff?

A 11-15-68.

THE COURT: Go ahead.

THE WITNESS: Well, apparently it was obvious that this gentleman had a progressive nerve deafness from all our findings and it was important to establish a diag-

nosis so we could tell him the cause effect and what he might anticipate. The obvious lead was the fact that he had received drugs that could well have caused this hearing loss. And so I wrote to the Veterans Administration trying to explore the kind of drug he had received to determine if that was the cause. That letter [5-84] was sent several days later and actually November 18, 1968.

BY MR. KUBY:

Q Would you please read that letter, sir?

A This letter was sent to Dr. Mazaleski who was apparently the referring physician who said:

I've just done an otologic study on Mr. Kubrick who is under your care. The enclosed audigram reveals a substantial degree of bilateral nerve deafness involving the high frequencies. The damage is to the hair cells of the cochleum on both sides. Mr. Kubrick's ability to distinguish sound is especially reduced in the left where it is less than 50 percent of what he hears. The etiology of this condition could well have been some ototoxic drug or auditory or cochlea neuritis. We are investigating the drugs that he received during his recent hospitalization and I hope we can prevent further degeneration of his hearing.

Q Now, Dr. Sataloff, in laymen's language what did you find wrong with his hearing at the time of the first examination?

A He had nerve deafness, which means the telephone cable and the microphone that carries messages from sound waves in the air when you speak to the brain had been damaged so that they were unable to convey the messages in an understandable form.

Q And in order to reach this diagnosis did you perform tests?

A Yes, sir.

[5-85] Q Just for the record, what were those tests?

A Well, basically the tests are certain pure tones to determine which areas of the microphones in the ears were damaged and the ability to distinguish sound. Like I am talking to you. If you had nerve deafness you might

distinguish maybe 80 percent, 70 percent or less of what I say to you.

Q Now you indicated in your letter to the referring doctor that there was loss of high tones. Can you explain the tonality of hearing in laymen's language?

A Well, the basic difficulty with most nerve deafness is not that the problem is in hearing but in distinguishing what is being said. And that is why older people continually say "What did you say?" Because they lose the ability to distinguish one consonant from another and it is the consonants that give language meaning. So if I say sick it sounds like thick. If I say yes it sounds like yet. So they can't distinguish S, F, T and Z one from the other. And in a noisy environment it becomes aggravated or exaggerated.

Their chief difficulty is not so much in hearing but in distinguishing from everyday communication.

Q Did you have any documentation at the time you first saw Mr. Kubrick in your office in November of 1968, and that is, documentation from the hospital where he had this operation?

A No, sir.

Q Did you subsequently receive any documentation?
[5-86] A Yes, sir.

Q Can you tell us when you received documentation for the first time and the extent of the documentation that you did receive?

A January 3, 1969.

Q Can you tell us the documentation that was received?

A It was a letter from the Veterans Administration in Wilkes-Barre signed by a Dr. Powell who was chief of staff. It contained a paragraph summarizing his surgical treatment.

Q And is that all that you received?

A Yes, sir.

Q Did you receive any information on the drugs that were administered to Mr. Kubrick?

A Yes, sir.

Q And was that included in that document that was sent to you?

A Yes, sir.

MR. KUBY: If you Honor please, for the Court's perusal that is the fact sheet of the hospital record that has previously been admitted.

Q Now in that one-page document that was received was a drug mentioned?

A Yes, sir.

Q What was that drug?

A He had oral polycillin and neomycin irrigation through [5-87] hemovac tubes.

Q Was there any information given to you at that time as to the extent of the neomycin that was given to him while he was in that hospital?

A The amount was not indicated, no.

Q Was there ever at that time given to you the number of days that he received that medication?

A No, sir, I did not get it at that time.

Q Did you reach any conclusions, Doctor, after receiving that information?

A Yes; I had no doubt that he had neomycin ototoxicity.

Q In laymen's language what do you mean by that?

A He received an amount of drug that had damaged his hearing. That's a side effect of the drug.

Q Now that was a conclusion that you received in 1969?

A Yes, sir.

BY THE COURT:

Q When did you get those records, Doctor?

A January 3, 1969.

Q And that's when you reached that conclusion?

A Yes, sir.

BY MR. KUBY:

Q Did you have in your mind or are there any other causes for nerve deafness?

[5-88] A Yes, sir, there are many causes.

Q Would you please state for the record what they are?

A Hereditary, cephalitic, other drugs, viral infection, noise-induced hearing loss, premature aging. A number of leukemia and systemic diseases that can cause this picture.

Q When did you next see Mr. Kubrick?

A January 10, 1969.

Q Did you have any discussions with Mr. Kubrick at that time concerning his situation?

A Yes; I have a note that I told him that it was neomycin that caused his hearing loss. And that was also the cause of his ringing tinnitus.

BY THE COURT:

Q What was that date again?

A January 10, 1969.

Q Did you tell him that it was "possible" that it was neomycin that caused his hearing loss or that it was neomycin?

A That it was neomycin, yes.

BY MR. KUBY:

Q Doctor, did you subsequently on his behalf write to the Veterans Administration?

A Yes, sir.

Q When did you next write to the Veterans Administration?

A I don't have a copy of that letter offhand but I received an answer September 5, 1969.

[5-89] Q What did that letter say?

A It was a form letter. He brought it in to me.

We have reviewed your claim for service connection for defective hearing and determined that your alleged hearing loss is not medicinally or medically attributable to your recent hospitalization at the VA Hospital. Accordingly, your claim is denied.

I have the letter now, sir, if you would like, September 16, 1969.

Q That is what you wrote to the—

A Yes, sir.

Q Would you tell us what you wrote to the Veterans?

A Dear Mr. Dudish, There is a very excellent possibility that Mr. Kubrick's hearing damage could have been due to the use of neomycin by irrigation. I base this on the minimal records I have received but in view of the findings I hope you will follow through to obtain for Mr. Kubrick the support that is warranted.

Q You use the phrase "very excellent possibility."

A Yes, sir.

Q Is that the kind of language you used with Mr. Kubrick in your discussions with him?

A No, sir.

Q Well, can you explain why you used it there and why you didn't use it with Mr. Kubrick?

[5-90] A Well, one doesn't always put into writing what he is a little more free to say. There is no question in my mind that the cause was the neomycin. But it is not so easy to go on record and say this to a hospital at this stage of the game. There is no question in my mind at this time that it was neomycin induced.

Q Did you continue to see Mr. Kubrick?

A Yes, sir.

Q At what frequency?

A Every two or three months.

Q Can you just in a synopsis form for the year 1969 tell us what you did for him and how his situation progressed?

A The best I could do was to monitor his hearing and provide some medication that might prevent it from getting worse. And the latter we succeeded. His hearing did not deteriorate over a period of some years to any specific degree but we have no cure for this type of hearing in the high frequencies.

BY THE COURT:

Q What does the medication do, Dr. Sataloff?

A It's supposed to increase the blood supply to the inner ear. It is a peripheral vascular dilator. I am not certain he wouldn't have stabilized without medication. But since it has no bad effects we generally use this.

[5-91] BY MR. KUBY:

Q The medication you say increases the blood supply?

A Yes, sir.

Q To the inner ear?

A Yes, sir.

Q What is that supposed to do? What is the objection?

A Well, if you have a sick nerve or a damage injury—a part of your body and you put heat to it, that's the purpose of the heat. It increases the blood supply and makes regeneration powers if possible or tries healing. And that's the purpose of this medicine.

Q Did you at any time after the letter that you sent—I believe it was in September of 1969—direct any further communication to the Veterans Administration?

A I don't have a record of it but I did receive a letter from them on June 13, 1969.

Q June 13, 1969?

A Yes, sir.

Q And what does that letter inquire of?

A Their letter says this veteran applied for disability benefits and stated he was treated by me for defective hearing and asks for information from me. And I filled out a form which I have here, writing there was an excellent chance of Mr. Kubrick's present hearing loss is the result of neomycin [5-92] toxicity. He gives a history of medication with this drug prior to the onset of his loss. I sent him a copy of the audigram and indicated that there was at that time progressive degeneration in a period of several months.

Q And that was sent June 30, 1969?

A Yes, sir.

Q And at the top it indicated the number of times you had treated him up to that point?

A Yes, sir.

Q Which was five visits; is that correct?

A Yes, sir.

Q Now, did you have any further communication after that, Dr. Sataloff, with anyone at the VA?

A No, sir, not to the best of my recollection.

Q Did you continue to treat Mr. Kubrick during 1970?

A Yes, sir.

Q Dr. Sataloff, I show you a bill listing dates of treatment and the charges for it, which I have noted as P-55. Does that correctly state—

A I charged him \$10 a visit until a certain time and then our fees were up to \$15.

Q No, but does that correctly list the dates that you saw him?

A It looks reasonable, yes.

[5-93] Q Those are the dates that You saw him?

A It appears to be.

Q Now, did you continue to see him in 1970?

A Yes, sir.

Q And what, if any, treatment did you render to him in 1970 and what was his condition in 1970?

A Well, at one time in June he seemed to be a little worse and developed some dizziness. So I gave him some medication for that. And then I saw him again in September. He seemed to be well stabilized and was doing well.

Q Did you take any further hearing tests?

A Yes, almost every visit we had a hearing test done.

Q How did his hearing progress?

A In 1970 the left ear seemed to be dropping a little but but then it stabilized quite satisfactorily at a pretty good level. And since then there has been no deterioration.

Q Did you continue to see him in 1971?

A Yes, sir.

Q Did there come a time, Dr. Sataloff, in 1971, in the summer of 1971 that you met with Mr. Kubrick in your office and referred him to a lawyer?

MR. HOLL: Objection, Your Honor. It is grossly leading.

THE COURT: Yes, I would have to agree.

[5-94] BY MR. KUBY:

Q Did you meet with Mr. Kubrick in 1971, in the summer of 1971?

A On June 18th of '71 I saw him in the office.

Q Did you have any discussions with him at that point concerning legal counsel?

MR. HOLL: Objection, Your Honor. He is leading.

THE COURT: It is leading, Mr. Kuby.

BY MR. KUBY:

Q What discussions did you have with Mr. Kubrick at that time?

A Well, he and his wife during that period, to the best of my recollection, were very, very disturbed because he had this severe deafness. He had been refused any compensation. He was very distraught. He had little funds available and I felt very sympathetic with him. And he said—and his wife was participating in this discussion—that since they caused his damage that he ought to be compensated and was there something I could do to help. And I felt that this was not within my prerogative but I said that the best thing for you to do is to see a good attorney who would be sympathetic for your problem.

And he said: Could you recommend anybody?

At that time there was a gentleman with whom I played tennis. I did not know his competence but I knew him to be a man of high integrity on the tennis court and I thought that [5-95] that was a good indication. So I referred him to him. And that was the extent of our conversation.

Q And who was that attorney?

A A Mr. Leonard Sagot.

Q Did you subsequently meet with Mr. Sagot or someone from his office?

A Someone from his office came in whom I had no contact at all with. I never knew him before.

Q Was that Mr. Anapol?

A Yes, a man named Mr. Paul Anapol.

Q Dr. Sataloff, as of the time that you suggested Mr. Sagot to Mr. Kubrick, had you ever obtained any further records from the Veterans Hospital concerning the drug neomycin?

A No, sir.

Q Did you subsequently to that time obtain the full medical records concerning the hospitalization and the giving of neomycin?

A Yes, sir.

Q From whom did you get those?

A Well, I suspect it was from his attorney.

Q And in what year did you get those?

A I don't remember. '73, '74, something like that.

Q Doctor, at any time from the time you first saw Mr. Kubrick until you suggested a lawyer to him in the summer of 1971, did you ever discuss the issue of his negligence or carelessness or the malpractice of any doctor in the Veterans [5-96] Hospital with him in relationship to the neomycin that was given to him?

A Well, I certainly didn't bring up the issue with Mr. Kubrick but there were many discussions in which he wanted something done to the doctors that caused his deafness. If that's what you mean.

BY THE COURT:

Q Who said what to whom on that subject, Dr. Sataloff?

A Well, both Mr. and Mrs. Kubrick were quite disturbed he had been made deaf by the doctors at the hospital, and that he had no recourse to either compensation or treatment. They wouldn't help him in any direction. I tried to console him as much as possible. I didn't know the facts.

Q But was there any discussion of the notion of fault or blame or culpability in that interim?

A Your Honor, there was no question that it was due to the drug and that the doctors gave him the drug and what was the extent of the culpability.

Q Was there any investigation as to the appropriateness of the drug under the circumstances or alternative drugs or the appropriateness of the dosage? Did you get into that with him?

A That was not within my realm, sir.

Q After you got that face sheet or summary sheet, did you write again for more records to the VA Hospital in Wilkes-Barre?

[5-97] A No, I wrote to—

Q You wrote to Mr. Dudish?

A Yes, that's the one. Because I was concerned the VA was responsible and I was a consultant to the VA, that they ought to assume this responsibility more seriously.

Q You were a consultant to the VA in Philadelphia, I take it?

A No, I was a national consultant to the Veterans in Otology in Washington.

Q But you did not ever formally request the complete hospital records so as to evaluate it?

A No, sir, I did not.

BY MR. KUBY:

Q So that you never discussed the issue of malpractice or negligence with the Kubricks?

A No, sir. Certainly not malpractice, Mr. Kuby.

Q Doctor, subsequent to his referral to a lawyer, did you continue to treat Mr. Kubrick?

A Yes, sir.

Q And you continued to treat him up until when?

A March of '75 he was in last.

Q What was his condition as of March of 1975?

A There was no change from what it was in the past year or two.

* * *

[5-123] MR. KUBY: I think it was heavy dosages of pain killers and antibiotics.

THE WITNESS: Heavy dosages of pain killers and antibiotics.

BY MR. HOLL:

Q They were his exact words as you recorded it?

A Yes.

Q And that first visit that you had with Mr. Kubrick did you express to him an opinion as to what caused his deafness?

A Well, there was a very good chance that we agreed it could have been the drug that he got.

BY THE COURT:

Q Well, I take it for you, Dr. Sataloff, with your knowing of you field and your knowledge—well, with your knowledge of the field, let's say, when you got that hospital record it didn't take you very long to put two and two together?

A That's right, sir.

Q It was an instant apprehension by you that this was probably the cause, I take it?

A That is was the cause. Not even probably.

Q That is was the cause?

A Yes, sir.

Q In terms of your own thinking, did you stop with the judgment that it was the cause but did you at least think about [5-124] the question whether he got too much or whether they should have given him something else or whether they should have used it as an irrigant, as a wound irrigant?

A Your Honor, it is unavoidable to think in those terms. But I think experience makes you also qualify that statement. You never know what a man has to do when he is saving a man's life or treating infection. I have been involved in many of these cases. And it is very presumptuous to place yourself as God in another man's position in the case, especially a serious medical case.

Q So that if you thought, you kept your thoughts to yourself?

A I did that, sir.

THE COURT: Go ahead.

BY MR. HOLL:

Q Dr. Sataloff, you also testified on direct examination I believe, that Mr. Kubrick expressed to you his feeling of wanting to do something to the doctors for causing his deafness; is that correct?

A Yes. Not physically.

Q Could you be more precise as to what he told you?

A He wanted to take action so that he can be compensated for his handicap.

Q Did you discuss this with him?

A I'm sure I discussed it. He had a handicap and that I felt he deserved compensation. I felt very sorry for him.

[5-125] Q Well, would it be your testimony that from the conversations you had with Mr. Kubrick that he expressed to you that the doctors had done something wrong to him?

A That was the impression that I had. But I never discussed this with him.

Q But you believed that that's what he thought?

A Yes, sir.

THE COURT: Do you object?

MR. MINKOFF: Objection, Your Honor.

THE COURT: Objection sustained. The answer is stricken.

BY MR. HOLL:

Q When did you have these conversations with him?

A About what, sir?

Q About him having feelings that the doctors had done something wrong.

A It is a very natural tendency for a man to have a condition like this and discuss somebody caused the damage to him. He certainly wasn't very happy about it. But I'm sure in many of the visits that he and his wife were very distraught about. And I was very sympathetic, I must say. I spent a lot of time trying to offer the kind of advice that was justified here.

Q Is there any question in your mind, that from the time of the very first visit by Mr. Kubrick with you that he knew the cause or he believed that the cause of his deafness was anti-[5-126]biotics that he received at the Veterans Administration?

MR. MINKOFF: Objection.

THE COURT: The objection is sustained.

BY MR. HOLL:

Q Is there any question in your mind, Doctor, on the very first visit you told Mr. Kubrick it was your opinion that the medication he had received at the hospital could have caused his deafness?

THE COURT: He said that he told him, not that it possibly could have caused his deafness but that it did cause his deafness. Isn't that what you said?

THE WITNESS: Yes, sir.

BY MR. HOLL:

Q Dr. Sataloff, one last thing. You testified that an otologist would probably find out first about the ototoxicity of a drug through the literature.

A Yes, sir.

Q I show you, sir, a document. This is an article, Doctor, that appeared in the June 1969 journal, New England Journal of Medicine written by Dr. David Kelly. Did you ever hear of Dr. David Kelly?

A I didn't think I did. I do now.

MR. KUBY: I didn't get the last answer.

THE WITNESS: I think I know Nilo better than Kelly. But I know the name Kelly. Nilo is one of his coworkers.

. . . .

TESTIMONY OF JOAN KUBRICK

* * * *

[6-100] Q These were you thoughts?

A Yes.

Q Now that is the letter directed to whom?

A Mr. Donald Lee Johnson.

Q He is the administrator of Veterans Affairs?

A Yes.

Q In Washington?

A Yes.

Q Now there has been testimony concerning the use of certain terms in that letter. Medical error and the other similar terms. I am sure you are familiar with that letter but tell His Honor what you mean by the term "medical error" or "error" where it appears in that letter.

A Well, I believed that the board that made the decision they said that neomycin had no connection with a hearing loss. That, in other words, it just couldn't happen. And I believed that they had made an error.

Q Did you, Mrs. Kubrick, at that time, the time of that letter, have any suspicions or had any discussions with any doctors or lawyers or anyone else that gave you any suspicion of carelessness or negligence or malpractice on the part of the Government's doctors?

A No, sir; I thought he had gotten good care at the Veterans Hospital. I felt that they had, the Government, if anybody [6-101] would have, they have the best doctors, the best hospitals, the best everything.

Q When you say on Page 2 where it says:

"All I care to say in the matter, I suffered the consequences of an error, told the truth, produced sufficient reputable evidence and then suffer further because someone does not feel they can admit to the truth of making a mistake."

What did you mean by that? Specifically the words "error" and "mistake"?

A Well, the board. They made a mistake. They made a judgment. They said neomycin it was impossible for

this to happen. And I felt that like they made a mistake.

Q The last line there:

"Perhaps you recommend me to a hospital or doctor capable of correcting this error."

What did you mean by that?

A Well, one of us made a mistake. Either I made it or they made it. And they weren't believing him that he actually—there were instances they didn't actually believe he had a hearing loss.

Q Can you explain that?

A Well—

MR. HOLL: Objection, Your Honor. As to her testifying as to what they believed or what they didn't believe.

[6-104] Q Your error in thinking that the Government was in error?

A That neomycin had done it.

Q Mrs. Kubrick, I show you a document marked P-31, which is Government 37, dated October 27, 1970, 12 days after you wrote the letter to Donald Johnson. Did you compose and type this letter?

Q Under what circumstances was that composed?

A Under difficult circumstances.

Q What do you mean?

A Well, I had seen it was a desperate situation. All along anything they asked for they were given. First of all, they said that it didn't happen. So, as I said, Bill went and he took that test over on Cherry Street. And then they said: Well, maybe you were deaf before. And we supplied evidence where they could find information about this. And that was, I think, in July of '70 when they were told where to get information. And then we were going to Dr. Sataloff in October.

We stopped in at the VA office in Philadelphia. I asked them if they had gotten this information that they were looking for to decide on this case. And they said: As a matter of fact, no, they didn't get a chance to send for it. They were just sending for it that day. And when you see a man sit up at night, cry by his bed because he can't

sleep it is desperate. They weren't listening to me, they didn't listen to a word I [6-105] said in all these letters.

When someone doesn't listen to you, well, when my kids don't listen to me I shout real loud. I had to get their attention. And I pleadingly wrote to this man to look over these facts to see.

Q Mrs. Kubrick, I direct you attention to the second page, the third paragraph, which says "I do believe your office". Would you read that?

A I do believe you office will be receiving further evidence of the fact that, I had normal good hearing before this drug had be administered, without using proper precautions. I would appreciate this new evidence being placed on file along with other evidence.

Q What did you mean by the words "proper precautions"?

A I was angry and this is my way of shouting to get their attention.

MR. HOLL: Objection, Your Honor. The answer is not responsive to the question. He asked her what she meant by the words.

THE COURT: Overruled.

A I had no basis to really believe that. But these people weren't listening. They hadn't heard a word I said in two years. They didn't even believe him.

BY MR. KUBY:

Q Mrs. Kubrick, I show you a letter, which is marked P-39.

* * *

[6-120] THE COURT: Go ahead, Mr. Holl.

BY MR. HOLL:

Q Well, Mrs. Kubrick, do you know what a parenthetical phrase is?

A A what, sir?

Q A parenthetical phrase.

A No.

BY THE COURT:

Q What high school did you go to?

A Dickson City.

BY MR. HOLL:

Q Mrs. Kubrick, let's go back a little bit in that sentence to the word "please". Do you see that second sentence, second paragraph?

A Yes.

Q Read with me: "Please keep in mind I already have gone through much, when I lost my hearing as a result of a medical error, whether or not the Veterans Administration cares to recognize the truth".

Mrs. Kubrick, isn't the clear meaning of that to you when you wrote it, that is to you now that when your husband went through a lot when he lost his hearing?

A He sure did.

Q And that is what that meant, wasn't it?

A Yes.

[6-121] Q And that he lost that hearing because of a medical error; isn't that correct?

A No. He lost his hearing because of the drug neomycin. Not that there was anything improper with this drug or improper with the doctors giving it to him. But he lost it from a drug.

BY THE COURT:

Q That is what you felt at that time?

A Yes.

Q Did you take typing in high school?

A No.

Q Where did you learn to type?

A I am kind of ashamed of my typing. I don't type good. I just do it sort of a one-finger type thing.

Q What jobs have you worked at since you got out of school?

A Well, I worked in a glove store in sales selling. I worked in electronics.

Q You were an assembler?

A A laborer.

BY MR. HOLL:

Q Mrs. Kubrick, in the first paragraph of this letter you tell a story about a Mrs. Clare Bussi from Peckville, don't you?

A Yes.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 78-1014

UNITED STATES, PETITIONER

v.

WILLIAM A. KUBRICK

ORDER ALLOWING CERTIORARI

Filed February 21, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.